FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., etc., *et al.*,
Petitioners,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Petitioner,

and

AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,
Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, etc., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitions for Writs of Certiorari Filed
July 5 and 6, 1977
Certiorari Granted October 3, 1977

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Date	Proceedings
9-21-73	Filed verified complaint and issued summons.
12-14-73	Filed plaintiffs' interrogatories.
1-25-74	Filed defendant Henry Flagg's answers to plaintiffs' interrogatories.
2-8-74	Filed affidavit and notice of motion of Louis J. Lefkowitz for permission to intervene as defendant.
2-8-74	Filed answer of Louis J. Lefkowitz.
4-10-74	Filed answer of defendants Flagg Brothers, Inc. and Henry Flagg.
4-19-74	Filed notice of motion and motion for leave to intervene as defendants.
4-19-74	Filed answer of American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc., proposed intervenor defendants.
4-26-74	Filed defendants' affidavit in opposition to motion for intervention by Gloria Jones.
6-26-74	Filed affidavit and notice of motion to permit Warehousemen's Association of the Port of New

Relevant District Court Docket Entries—73 Civ. 4050

York, Inc. and The Cold Storage Warehousemen's Association of the Port of New York to intervene as defendants.

6-26-74 Filed answer of proposed intervenor defendants.

6-26-74 Filed plaintiffs' affidavit in opposition to motions for intervention by proposed association intervenors.

6-26-74 Filed notice of motion for an order permitting Gloria Jones to intervene.

6-26-74 Filed proposed intervenor's complaint.

6-26-74 Filed intervenor Gloria Jones' reply affidavit in support of motion to intervene.

6-26-74 Filed opinion #40873 . . . The four motions to intervene as party defendant are granted; the State Attorney General of the State of New York is permitted to intervene on consent. Further caption in the action shall include the names of the intervening parties. Plaintiff Brooks has no claim for injunctive relief but only a claim for damages and declaratory relief. It is so ordered. — Gurfein, J.

8-20-74 Filed stipulation and order that the proposed intervenor's complaint of Gloria Jones, as annexed to her motion to intervene in this action, is hereby deemed to be her actual complaint. . . . So ordered.— Gurfein, J.

10-7-74 Filed defendant Flagg Brothers, Inc.'s and Henry Flagg's affidavit and notice of cross-motion to dismiss complaint.

Relevant District Court Docket Entries—73 Civ. 4050

10-7-74 Filed memorandum of defendants Flagg Brothers, Inc. and Henry Flagg in support of cross-motion to dismiss and in opposition to plaintiffs' motion for summary judgment and class action determination.

10-9-74 Filed memorandum of law of Attorney General in defense of constitutionality.

11-6-74 Filed defendants Flagg Brothers, Inc.'s and Henry Flagg's reply memorandum of law in support of cross-motion to dismiss.

6-17-75 Filed supplemental memorandum of law of Attorney General.

7-7-75 Filed plaintiffs' memorandum of law in opposition to cross-motion to dismiss complaint.

7-7-75 Filed plaintiffs' affidavits and notice of motion for class action determination and summary judgment.

7-7-75 Filed plaintiffs' memorandum of law in support of motion for class action determination and summary judgment.

7-7-75 Filed defendant-intervenor AWA's and IARW's affidavits and memorandum of law in opposition to plaintiffs' motions.

7-7-75 Filed affidavit of defendant-intervenors Warehousemen's Association of the Port of New York, Inc. and The Cold Storage Warehousemen's Association of the Port of New York.

Relevant District Court Docket Entries—73 Civ. 4050

7-7-75	Filed Opinion #42742 . . . Plaintiffs' motion for class action determination and for summary judgment is denied. Defendant's motion to dismiss for lack of jurisdiction is granted. Plaintiffs' action is dismissed for lack of jurisdiction. Plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28:1343(3), or to state a claim under 42:1983. The action is, therefore, dismissed. So ordered. — Werker, J. m/n
7-7-75	Filed memorandum endorsed on plaintiffs' motion for class action determination and summary judgment filed 7-7-75: Motion denied. Complaint dismissed. See opinion #42742. So ordered. — Werker, J. m/n
7-7-75	Filed memorandum endorsed on defendants' cross-motion to dismiss filed 10-7-74: Motion granted. See opinion #42742. So ordered. — Werker, J. m/n
7-7-75	Filed plaintiffs' notice of appeal to the Second Circuit from order denying plaintiffs' motion for class action determination and summary judgment and granting cross-motion to dismiss complaint.

RELEVANT COURT OF APPEALS DOCKET ENTRIES—75-7437 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, ***SHIRLEY HERRIOTT BROOKS, ET AL. v. FLAGG BROTHERS, INC., ET AL.,***

Dated	Proceedings
7-31-75	Filed copies of docket entries and notice of appeal.
9-12-75	Filed record (original papers of District Court).
10-31-75	Filed briefs of appellants-plaintiffs.
10-31-75	Filed joint appendix.
12-15-75	Filed briefs of appellees-defendants Flagg Brothers, Inc. and Henry Flagg; American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.; the Attorney General of the State of New York; Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York.
1-5-76	Filed reply brief of appellants-plaintiffs.
2-13-76	Argument heard by: Timbers, C.J., Holden, D.J., Bryan, D.J.
4-7-77	Filed opinion and judgment. District Court order reversed and case remanded. The combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law

remedies suffices to thrust the state's involvement in the challenged activity over the state action threshold. Per Bryan, D.J.

4-7-77 Filed separate opinion in dissent. The defendant warehouseman's exercise of the power of sale allowed by the Uniform Commercial Code is not state action. Per Holden, D.J.

7-12-77 Filed notices of filing of petition for writ of certiorari. Nos. 77-25, 77-37, 77-42.

VERIFIED COMPLAINT (CLASS ACTION)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 4050

SHIRLEY HERRIOTT BROOKS, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., and JAMES A. LEVISTER, individually and as City Marshall of the City of Mount Vernon, New York,

Defendants.

I.

PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §§1983 and 1985. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privileges and immunities secured by the United States Constitution without regard to the amount in controversy.

3. Jurisdiction is also conferred on this Court by 28 U.S.C. §1343 1(1), (3) and (4) which grants this Court jurisdiction over claims authorized by 42 U.S.C. §1985.

4. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §§1983 and 1985. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

III.

CLASS ACTION ALLEGATIONS

A. Plaintiff Class

5. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

6. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs without an opportunity to be heard, have acted and refused to act on grounds generally applicable to the class.

B. Defendant Class

7. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the

State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

8. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.

THE PARTIES

9. Plaintiff Shirley Herriott Brooks is a citizen of the United States and of the State of New York. Plaintiff resides at 120 North Kensico Avenue, White Plains, New York with her three children, George, Jr., age 12, Tonya, age 11 and Michael, age 10. Plaintiff's husband died in an automobile accident approximately one year ago. Plaintiff is employed as a nurse's aid by the Brooke Rehabilitation Center, White Plains, New York, for which her take home pay is approximately $100 per week. This is the sole source of income for plaintiff and her family.

Verified Complaint

10. Defendant Flagg Brothers, Inc. is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

11. Defendant Henry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

12. Defendant James A. Levister is the City Marshall of the City of Mount Vernon, New York. He is being sued individually and in his official capacity.

V.

FACTUAL ALLEGATIONS

13. In the spring of 1973, plaintiff and her family were residing at 33 North 3rd Avenue, Mount Vernon, New York. Pursuant to an order of eviction that had been entered against plaintiff by the City Court of Mount Vernon, defendant Levister, City Marshall of the City of Mount Vernon, appeared on June 13, 1973 to remove plaintiff and her possessions from her apartment.

14. When defendant Levister appeared to remove plaintiff and her possessions from her apartment on June 13, 1973, plaintiff informed defendant Levister that she wanted to call someone to store her furniture and other household possessions. Defendant Levister informed plaintiff that she couldn't get anyone to store her furniture and that the man with him, defendant Flagg, was the man who would store her furniture. Plaintiff was led to believe by defendant Levister's comments that she had no choice but to let defendant Flagg store her goods.

Verified Complaint

15. Defendant Flagg informed plaintiff that plaintiff would have to pay $65 per month for the moving and storage of the furniture. Plaintiff informed defendant Flagg that this sounded like a high price, but believing that she had no choice in the matter, told defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

16. After plaintiff's goods were loaded on one of the defendant Flagg Brothers' trucks, one of Flagg Brothers' moving men told plaintiff that she would have to pay $178. Plaintiff protested, since she had been led to believe that $65 was the entire cost. The moving man explained that she would have to pay $75 per month for storage, $75 for barrelling and platforming and $28 for fumigating, for a total of $178. Plaintiff inquired whether she had to have fumigating and the moving man responded that fumigating was required. After first insisting on payment in cash, defendant Flagg agreed to accept plaintiff's check for $178.

17. After plaintiff was evicted, she and her children moved into her cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

18. On or about June 15, 1973, plaintiff called defendant Flagg Brothers in order to find out how long defendant Flagg Brothers would store plaintiff's goods for her $178 payment. An employee of defendant Flagg Brothers informed plaintiff that she owed defendant Flagg Brothers an additional $156.

19. On or about June 19, 1973, plaintiff went to the office of defendant Flagg Brothers. Plaintiff was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the $178 payment as a "deposit" and that there was a "balance due" of $156. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". Plaintiff informed defendant Henry Flagg

that the prices were unreasonable and that plaintiff couldn't pay them. Defendant Henry Flagg informed plaintiff that on the first of July, 1973, plaintiff would owe an additional $75 for storage for the month of July. Plaintiff told defendant Henry Flagg that her storage on June 13, 1973 should run to July 13, 1973. Defendant Henry Flagg informed plaintiff that even if her goods had been stored on June 29, 1973, the storage charges are on a "per month" basis and that an additional $75 would be due by July 1, 1973.

20. On or about June 29, 1973, plaintiff made a telephone call to defendant Henry Flagg. Defendant Flagg offered to let plaintiff remove her goods by July 13, 1973 if plaintiff would pay the balance of the original bill allegedly due ($156) plus $45. Plaintiff informed Mr. Flagg that her original payment should cover the storage of the goods from June 13, 1973 to July 13, 1973. Plaintiff was unable to remove her goods by July 13, 1973 because she was sharing an apartment with her cousin and there was, at this time, insufficient space in the apartment for her goods.

21. Approximately one week later, in early July, 1973, plaintiff called defendant Henry Flagg for a delivery date for her goods. Mr. Flagg's secretary gave plaintiff a date of August 14, 1973. Defendant Flagg Brothers' secretary told plaintiff that plaintiff could only obtain her possessions if she paid $484 in cash, which amount included the past balance allegedly due. Defendant Henry Flagg told plaintiff that payment had to be in cash and that Flagg Brothers does not accept checks or money orders.

22. On or about August 25, 1973, plaintiff received a letter dated August 22, 1973 from defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, has [sic] (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from
>
> | | | |
> |---|---|---|
> | Moving due | $156.00 | |
> | Storage for 7/73 & 8/73 | 150.00 | at $75.00 a month |
> | Total Bal. | $306.00" | |

A copy of this letter is annexed hereto as Exhibit "B". Accompanying this letter from defendant Flagg Brothers was a "Final Notice" noted August 22, 1973 informing plaintiff that unless payment on her storage account was made, defendant Flagg Brothers would advertise her goods for public auction. A copy of this Notice is annexed hereto as Exhibit "C".

23. On August 24, 1973, plaintiff wrote to defendant Flagg Brothers detailing her position and claims regarding defendant Flagg's billing computations and methods. A copy of this letter is annexed hereto as Exhibit "D".

24. On August 23, 1973, plaintiff's attorney wrote to defendant Flagg Brothers contesting defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed hereto as Exhibit "E". A copy of defendant's response to this letter is annexed hereto as Exhibit "F".

25. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued detention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed

hereto as Exhibit "G". Defendants have threatened to sell these goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity to be heard. The sale of these goods without a prior hearing will cause plaintiff and her family further grave and irreparable injury in that the goods being held by defendant Flagg Brothers constitute essential items of household furniture which plaintiff, because of her limited income of approximately $100 per week, cannot afford to replace.

26. On information and belief, a conspiracy agreement, or understanding exists between defendants Levister, Henry Flagg and Flagg Brothers pursuant to which defendant Levister notifies defendant Henry Flagg or other officer or employee of Flagg Brothers, Inc. that an eviction is to take place to enable defendant Flagg Brothers to obtain the contract for the moving and storage of the evicted tenant's goods. The source of this allegation are the facts alleged in paragraphs 14 and 15, *supra*.

27. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.

LEGAL CLAIMS

28. Defendants imposition of a lien on plaintiffs' goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause

of the Fourteenth Amendment to the United States Constitution.

29. New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

30. New York Uniform Commercial Code §§209 and 210 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that these statutes have the effect of irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in a subsequent legal proceeding, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

31. The conspiracy, agreement or understanding set forth in paragraphs 25, *supra* violates 42 U.S.C. §§1983 and 1985 and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution in that it denied and continues to deny plaintiff and all others similarly situated of their property without due process of law.

WHEREFORE, plaintiffs respectfully pray on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees,

agents and successors from encumbering plaintiffs' goods and selling these goods without affording plaintiff an opportunity to be heard.

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees, agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

(d) Enjoining defendants, their officers, employees, agents and successors from conspiring, agreeing or otherwise acting jointly and in concert as described in paragraph 26 herein.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-209 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter a final judgment declaring the conspiracy, agreement or understanding set forth in paragraph 26 herein in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1983 and 1985.

4. Enter a final judgment awarding plaintiff $5,000 actual and nominal damages against the defendants jointly and severally.

5. Enter a final judgment awarding plaintiffs $20,000 punitive damages against defendants, jointly and severally.

6. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

7. Award plaintiffs their costs, disbursements and attorneys' fees.

8. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: September 21, 1973
White Plains, New York

Respectfully submitted,

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

(Verified by Shirley Herriott Brooks on September 20, 1973)

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EXHIBITS TO COMPLAINT

Combined Uniform Household Goods bill of Lading and Freight bill — New York Commercial Zone.

FLAGG BROS. INC., MOVING & STORAGE

N.Y.C.—M.T. No. 826 | 247 SO. FIFTH AVENUE | MT. VERNON, N. Y. 10550 | 914-668-9261 – 212-324-5466

Can't Read Initials Pd. in Cash - 4 Cartons per Attorney - Book - Mat...

NAME Shirley Brooks Stone Tel.

FROM 33 N. Third Ave. Apt.
Mt. Vernon, N.Y.

TO Storage Apt.

OTHER STOPS

MOVING DATE 6/13/73 DAY Wed. TIME A.M. P.M.

TIME RECORD

Start A.M. P.M. Customer Initials

Finish A.M. P.M. Customer Initials

JOB HOURS 6

TRAVEL TIME ½

TOTAL HOURS 6½

MOVING RATE: VANS MEN @ $ Per Job Hr., Plus Hrs. Travel Time

ESTIMATE OR REMARKS

(Approx. estimate—packing date—Instructions on job—or other info.)

VALUATION

Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 ( ) cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT

(SIGN BEFORE START OF ANY SERVICE)

The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Shirley Brooks

By:

MOVER: FLAGG BROS. INC., MOVING & STORAGE

By:

DELIVERY RECEIPT

Except as specifically endorsed hereon
All services and All articles received in Good Condition

CUSTOMER: Shirley Brooks

By:

RATES and DESCRIPTION	CHARGES
MOVING 6 hours @ $ 28.00 per hr.	168.00
OVERTIME ____ hours @ $ ____ per hr.	
CARTAGE ____ cu. ft. @ $ ____ per cu. ft.	
WEIGHT ____ lbs. @ $ ____ per lb.	
PIANO CHGS.	
OTHER Travel Time	14.00
____ Barrels, packed ____ @ $ ____ each	
15 Barrels, loaned ____ @ $ 2.00 each	30.00
____ Wardrobes ____ @ $ 4.00 each	
6 Book Cartons or boxes ____ @ $ 1.50 each	9.00
5 Matt Cartons ____ @ $ 6.00 each	30.00
Other Fumigating	3.00
Whse. Labor chgs.	
Storage chgs. A month	75.00
Other	
Insurance; shipper declares the full value of the shipment for the purpose of insurance to be: Amt. $ ____ @ $ ____ per $100.00	
TOTAL CHARGES	334.00
Advance Deposit	178.00
BALANCE DUE	156.00

RECEIVED PAYMENT

MOVER FLAGG BROS. INC., MOVING & STORAGE

By

CUSTOMER'S BILL & RECEIPT TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.
(For Customer When Job Is Completed)

FORM 252A MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

EXHIBIT A — BILL OF LADING: TERMS AND CONDITIONS

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

EXCEPTIONS TO ABOVE LIABILITY FOR MECHANICAL, ELECTRICAL OR OTHER OPERATION OR FUNCTIONING, DELAYS, QUARANTINE, STORAGE-IN-TRANSIT OR CONTENTS OF PIECES OR CONTAINERS.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the acts of public authority, quarantine, riots, strikes, perils of navigation, the act or default of the shipper or owner, the nature of the property or defect or inherent vice therein. Except in case of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for the loss or damage thereto or responsible for its condition, operation or functioning, whether or not such property or any part of it is packed, unpacked, or packed and unpacked by the shipper or its agent or the carrier or its agent. Except in cases of negligence of the carrier or party in possession, no carrier or party in possession of all or any of the property herein described shall be liable for damage to or loss of contents of pieces of furniture, crates, bundles, cartons, boxes, barrels or similar containers unless such contents are open for the carrier's inspection and then only for such articles as are specifically listed by the shipper and receipted for by the carrier or its agent.

(c) Except in cases of negligence of the carrier or party in possession, the carrier or party in possession of any of the property herein described shall not be liable for delay caused by highway obstruction, or faulty or impassable highway, or lack of capacity of any highway, bridge, or ferry, or caused by breakdown or mechanical defect of vehicles or equipment.

(d) Except in case of negligence of the carrier or party in possession the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held or stored in transit upon request of the shipper, owner, or party entitled to make such request, whether such request was made before or after the carrier comes into possession of the property.

(e) In case of quarantine the property may be discharged at the risk and expense of the owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, and in such case, carrier's responsibility shall cease when the property is so discharged, or property may be returned by carrier at owner's expense to shipping point earning charges both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occassioned by fumigation or disinfection or other acts done or required by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detension, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

CLAIMS PROCEDURE AND LIMITATIONS

Sec. 2. (a) No carrier is bound to transport said property by any particular schedule, vehicle, train or vessel or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier in possession of the property when the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time, for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property so far as this shall not avoid the policies or contracts of insurance; provided that the carrier reimburse the claimant for the premium paid thereon.

(d) Any claim for loss, damage or overcharge whether made by the consignee, consignor or a third party beneficiary, shall be in writing and shall be accompanied by original paid Bill for transportation and original Bill of Lading, if not previously surrendered to carrier. Carrier may require certified or sworn statement of claim.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage, packing and repacking at owner's cost.

Sec. 4. (a) Property not received by the party entitled to receive it within the free time (if any) allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, at the time tender of delivery of the property to the party entitled to receive it or at the address given for delivery has been made, may be kept in vehicle, warehouse or place of business of the carrier, subject to the tariff charge for storage and carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a warehouse at the point of delivery or at other available points, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all transportation and other lawful charges, including a reasonable charge for storage. In the event the consignee can not be found at the address given for delivery, then in that event, notice of the placing of such goods in warehouse shall be left at the address given for delivery and mailed to any other address given on the bill of lading for notification, showing the warehouse in which such property has been placed, subject to the provisions of this paragraph.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it upon tender of delivery, or said consignee or party entitled to receive it fails to receive it or claim within 15 days after notice of arrival of the property at destination shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier; provided, that the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published; provided, that 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported to destination is refused by consignee or party entitled to receive it, or consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: provided, that, if there be time for service of notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given in such manner as the exercise of the diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of advances, tariff charges, packing, storage, and any other lawful charges and the expense of notice, advertisement sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owners of the property sold hereunder.

(f) Where the carrier is directed to load property from (or render any services at) a place or places at which the consignor or his agent is not present, the property shall be at the risk of the owner before loading.

Where the carrier is directed to unload or deliver property (or render any services) at the place or places at which the consignee or its agent is not present, the property shall be at the risk of the owner after unloading or delivery.

ARTICLES OF EXTRAORDINARY VALUE, DOCUMENTS, SPECIE

Sec. 5. No Carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Sec. 6. Explosives or dangerous goods will not be accepted for shipment. Every party whether principal or agents shipping such goods shall be liable for any indemnity the carrier against all loss or damage caused by such goods and carrier will not be liable for safe delivery of the shipment.

MOVER (CARRIER) WILL NOT RELINQUISH POSSESSION UNTIL ALL CHARGES ARE PAID

Sec. 7. The owner or consignee shall pay the advances, tariff charges, packing and storage, if any, and all other lawful charges on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the advances, tariff charges, packing charges, storage and all other lawful charges, except that if the consignor stipulates, by signature in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has not beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, in the case of a shipment reconsigned or deverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require, at time of shipment, the prepayment of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the advances or tariff charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election for common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

ALL CLAIMS, DISPUTES, OR CONTROVERSIES ARE SUBJECT TO ARBITRATION

Sec. 10. Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected hereby, whether such claim be founded in tort or contract, shall be settled by arbitration under the Arbitration Law of the State of New York, and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

EXHIBIT B — H. FLAGG'S LETTER OF AUGUST 22, 1973

MEMO LETTER

FLAGG BROS. TRUCKING SERV., INC.
247 SO. FIFTH AVENUE — MOUNT VERNON, N.Y. 10550

Phone 668-9261

MESSAGE

To
Ms. Shirley Stone Brooks

Dated 8/22/73

Dear Ms. Stone:

Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold.

Your previous bal. from Moving due	156.00	
storage for 7/73 & 8/73	150.00	@$75.00 a month
Total Due	306.00	

Signed Respectfully your, s/ Henry Flagg
H. Flagg, Pres.

EXHIBIT C — FINAL NOTICE

FINAL NOTICE

FLAGG BROS. INC., MOVING and STORAGE
41 EAST 3rd ST. MT. VERNON, N.Y. 10550
Phone: (914) 668-9261 and (212) 324-5466

August 22, 1973

Exhibit C

Shirley Brook Stone c/o M. Robinson
40 E. Sidney Ave.
Mt. Vernon, N.Y.

Dear Ms. Stone,

Your Storage Account, amounting to $150.00 is now seriously overdue, and we herewith request that you make a payment on same on or before Sept. 1, 1973.

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours, H. Flagg, Pres.
FLAGG BROS. INC.,
MOVING and STORAGE

EXHIBIT D — PLAINTIFF'S LETTER OF AUGUST 24, 1973

40 E. Sidney Ave.
Mt. Vernon, N.Y. 10550
Aug. 24, 1973

Flagg Brothers
41 E. 3rd St.
Mount Vernon, N.Y. 10550

Dear Sir

As per previous conversations via telephone and being repetitious I must try one last time.

I informed you of your prices and how it was almost impossible to pay.

When you came to my apt. to put my furniture in storage

Exhibit D

you informed me that storage would be sixty-five dollars; after putting all my furniture in your van one of your employees informed me of a new price as follows:

$75.00/ month storage
75.00 for platforming and barreling
28.00 for fumigating.

I gave a check for what I believed at the time was for a payment in full. The beginning of the next week I wanted to know how long this money would be good for. Your secretary informed me that I owed another $156.00. When asked why I was informed that there were other things I had to pay for boxes etc. Also I was informed to come in. When I came to the office the story again was different from that of the original and the second conversation. I wanted to know where my furniture was stored and wanted to see it, I again was informed there was a fee of thirty five dollars to see also my furniture was in Harrison. Since then there has been numerous telephone calls and still different prices quoted.

I didn't wish to cause trouble but you are making it very difficult for me so as a last resort I'm letting you know my intentions. You and I both know your prices are atroshish [sic] for storage etc. I have checked into this area thoroughly and know you do not charge by the hour to pick up and store furniture. This is something which is done by the amount of cubic feet.

It would be advisable for me to hear from you by return mail as to the amount of cubic feet of furniture and also for you to do something price wise since the first amount you gave me was to be the pd in full amt. $178.00. You also changed the storage price from $65 to $75 and quoted to me when I came to your office that "It's a shame you have to be a victim of circumstances even though its our fault."

Exhibit D

I expect an answer with in five days or/and I will have to take further action and have you investigated by the ICC and/or the PSC.

Thanking you in advance for letting me know something by mail with in five days.

Yours Truly
s/ Ms. S. Brooks

EXHIBIT E — LEGAL AID ATTORNEY'S LETTER OF AUGUST 23, 1973

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
56 GRAND STREET
WHITE PLAINS, NEW YORK 10601

(914) RO. 1-9200

August 23, 1973

Flagg Bros, Inc.
Moving & Storage
247 South 5th Ave.
Mt. Vernon, N.Y. 10550

Re: Shirley Helliott (Shirley Brooks Stone)
120 North Kensico Ave.
White Plains, N.Y.
(Formerly 33 N. Third Ave.)
(Mt. Vernon, N.Y.)

Gentlemen:

Mrs. Stone has consulted me regarding charges being made for furniture which she has stored with you. As I understand, she was originally given a storage charge of $75. a month as indicated by the enclosed copy of your "Combined Uniform Household Goods Bill of Lading and Freight Bill." However,

Exhibit E

she states that since June 13, 1973 the price seems to increase everyday and that the only explanation she has been able to obtain is something to the effect that you are sorry for the different prices, but you are just a victim of circumstances.

I would appreciate your explanation of this situation — looked at from the standpoint of dollars as well as from what you determine to be your legal rights in order that I may be able to advise her further.

Very truly yours,

s/ John G. Kelly
John G. Kelly
Attorney

JGK/ea

EXHIBIT F — H. FLAGG'S LETTER OF AUGUST 30, 1973

FLAGG BROS., INC. MOVING AND STORAGE
247 SOUTH 5th AVE. MOUNT VERNON, N.Y.
914 668-9261
212-324-5466

August 30, 1973

The Legal Aid Society of Westchester 'County
56 Grand Street
White Plains, New York 10601

RE: Shirley Brooks Stone
120 N. Kensico Ave.
White Plains, N.Y.
Formerly 33 N. 3rd Ave.
Mt. Vernon, N.Y.

Dear Sir:

As we explain over the telephone, our rates are by the hour. For one (1) truck, three (3) men, we get $32.00 an hour plus ½ travel time. As far as your Bill of Lading is concerned, because

Exhibit F

of the circumstances and the hardship we were concerned at the time, we charged for 3 men and a truck for 6 hours @$28.00 an hour $168.00
plus ½ hour travel time which was 14.00
She used 15 Barrels @$2.00 ea. 30.00
6 Book ctns @1.50 ea. 9.00
5 Matt. Ctns @6.00 ea. 30.00
As standard procedure - Fumigating 8.00

I'm sorry we do not charge by cubic feet and as far as storage is concerned, we charge by the containers which is $25.00 per container per month. Ms. Stone gave $178.00 as a deposit which left a balance due on the original bill of $156.00.

Coming out of storage; you're charges again are by the hour for one (1) truck, three (3) men, @ $32.00 an hour. Charges coming out of storage estimated to be 5½ hours ½ travel time @ $32.00 an hour which these charges brings a total of . $176.00
7/73, 8/73 Storage due 150.00
Balance from old bill 156.00
$482.00

We must be paid in cash upon delivery before the furniture is unloaded from the truck.

Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings.

Respectfully yours,

s/ Henry Flagg
Henry Flagg, President
FLAGG BROS., INC.
MOVING & STORAGE

HF/mgd
cc: Ms. Shirley Stone Brooks

CONTRACTOR OR CARRIER

HOUSEHOLD GOODS DESCRIPTIVE INVENTORY

AGENT Flagg

CARRIER'S REFERENCE NO.

CONTRACT OR GBL. NO.

OWNER'S GRADE OR RATING AND NAME Shirley Brooks Stone

ORIGIN LOADING ADDRESS 33 N. 3rd Ave. Mt. Vernon, N.Y CITY STATE

GOVT. SERVICE ORDER NO.

DESTINATION Thorn's (3 Boxes)

VAN NUMBER

EXCEPTION SYMBOLS

BE-BENT
BR-BROKEN
BU-BURNED
CH-CHIPPED
CU-CONTENTS & CONDITION UNKNOWN
D-DENTED
F-FADED
G-GOUGED
L-LOOSE
M-MARRED
MI-MILDEW
MO-MOTHEATEN
PBC-PACKED BY CARRIER
PBO-PACKED BY OWNER
R-RUBBED
RU-RUSTED
SC-SCRATCHED
SH-SHORT
SO-SOILED
T-TORN
W-BADLY WORN
Z-CRACKED

LOCATION SYMBOLS

1. ARM
2. BOTTOM
3. CORNER
4. FRONT
5. LEFT
6. LEGS
7. REAR
8. RIGHT
9. SIDE
10. TOP
11. VENEER

NOTE: *The omission of these symbols indicates good condition except for normal wear.*

ITEM NO.	CR REF	ARTICLES	CONDITION AT ORIGIN	EXCEPTIONS IF ANY AT DESTINATION
1				
2	2			
3				
4	1			
5				
6	1			
7				
8			✓	
9				
0				
1	1			
2	1			
3				
4				
5	1			
6	1			
7	1			
8	2			
9	2			
0	1			
1	6			
2	2			
3	1			
4	2			
5				
6	2			
7	1			
8				
9				
0				

ITEM NO. REMARKS/EXCEPTIONS

"We have checked all the items listed and numbered 1 to____ inclusive and acknowledge that this is a true and complete list of the goods tendered and of the state of the goods received."

INVENTORY NUMBER

AT ORIGIN	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE	AT DESTINATION	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE
	OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE		OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE

EXHIBIT G — INVENTORY LIST

LIST OF ITEMS LISTED IN EXHIBIT G

3	Bedsprings	1	Iron bod.
2	Mattress	1	Shopping cart
2	Mirrors	2	Night stand
1	Dresser	3	Bed rail
2	Chest	1	Round table top
1	Sofabed	6	Book cartons cu
4	Kit. Chairs	2	Books cu
11	Barrels cu	1	Oven toy
3	Rugs	2	Bar stools
2	Padings		Table frames
1	Bar	2	Side chairs
1	Side Chair	1	High shelf
3	Room dividers		Sofa on rock
6	Trays		
1	Club chair		

AFFIDAVITS OF SERVICE OF SUMMONS AND VERIFIED COMPLAINT

(All affidavits and certificates of service of process filed in the proceedings in the district and circuit courts have been omitted in the printing of the Appendix.)

PLAINTIFFS' INTERROGATORIES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(Service list omitted)

Plaintiffs' Interrogatories

The plaintiffs in the above entitled action request that defendant, Henry Flagg, answer under oath the following interrogatories in accordance with Rule 33 of the Federal Rules of Civil Procedure:

1. State the exact or approximate number of contracts for moving and storage entered into by Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known and is not reasonably ascertainable, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

2. State the exact or approximate number of "Final Notices" (Exhibit "C" to complaint herein) given to customers of Flagg Brothers, Inc. by Flagg Brothers, Inc. during (a) 1971, (b) 1972, and (c) 1973. If the exact or approximate number is not known, state whether the numbers are in excess of (a) 50, (b) 100, (c) 200, (d) 500, (e) 1,000, (f) 2,000.

3. State the exact or approximate number of sales pursuant to New York U.C.C. §7-210 to authorize the liens authorized by New York U.C.C. §7-209 made by defendant Flagg Brothers during (a) 1971, (b) 1972, and (c) 1973.

PLEASE TAKE NOTICE, that a copy of the answer to the above interrogatories must be served upon the undersigned within 30 days after the service of these interrogatories.

Dated: December 13, 1973

s/ Gene F. Reibman
THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
Attorneys for Plaintiffs

ANSWER TO INTERROGATORIES

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

(Service list omitted)

The defendant HENRY FLAGG responding to the interrogatories of the plaintiff alleges as follows:

1. (a) In the year 1971, approximately 304 contracts for moving and approximately 43 contracts for storage were entered into by FLAGG BROTHERS, INC.

(b) In the year 1972, approximately 529 contracts for moving and approximately 70 contracts for storage were entered into by FLAGG BROTHERS, INC.

(c) In the year 1973, approximately 567 contracts for moving and approximately 70 contracts for storage were entered into by FLAGG BROTHERS, INC.

2. (a) In the year 1971 there were no "Final Notices" given to customers of FLAGG BROTHERS, INC.

(b) In the year 1972, there were no "Final Notices" given to customers of FLAGG BROTHERS, INC.

(c) In the year 1973, there were approximately 65 "Final Notices" given to customers of FLAGG BROTHERS, INC.

3. (a) In the year 1971, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

(b) In the year 1972, there were no sales pursuant to New York Uniform Commercial Code Section 7-210.

Answer to Interrogatories

(c) In the year 1973, there were approximately 18 sales.

Dated: New York, New York
January 14, 1974

s/ Alvin Altman
ALVIN ALTMAN
BRODSKY, LINETT
& ALTMAN
Attorneys for defendants
FLAGG BROTHERS, INC.
and
HENRY FLAGG

NOTICE OF MOTION TO INTERVENE: LOUIS J. LEFKOWITZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of A. SETH GREENWALD, sworn to February 6, 1974 the undersigned will make a motion for leave to intervene pursuant to Rule 24 of the F.R.C.P. at the United States Courthouse, Foley Square, New York, New York 10007 on the 22nd day of February, 1974 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order allowing the Attorney General of the State of New York to intervene in defense of the constitutionality of Uniform Commerical Code §§7-209, 7-210 and for such other and further relief as the court may deem just and proper.

Notice of Motion to Intervene: Louis J. Lefkowitz

Dated: New York, New York
February 6, 1974

Yours, etc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Pro Se
Proposed Intervenor

s/ A. Seth Greenwald
A. SETH GREENWALD
Assistant Attorney General

(Service list omitted)

AFFIDAVIT OF A. SETH GREENWALD IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

A. SETH GREENWALD, being duly sworn, deposes and says:

I am an Assistant Attorney General of the State of New York and make this affidavit in support of the Attorney General of the State of New York's motion to intervene.

Affidavit of A. Seth Greenwald in Support

The Attorney General under Executive Law §71 has an obligation to defend the constitutionality of the laws of the State of New York. This is similar to F.R.C.P. 24(c), on giving notice to the Attorney General of the United States. Pursuant to Rule 24(b). F.R.C.P., the Attorney General of the State of New York should be allowed to intervene because the defendants are expected to rely on a state statute, Uniform Commercial Code, §§7-209 and 7-210 as a defense. Executive Law §71 contemplates that only the Attorney General can adequately defend constitutionality of a state law. The defendants may assert compliance with U.C.C. §7-210 and therfore will be relying on a "state or . . . requirement or agreement issued or made pursuant to the statute . . . " F.R.C.P. 23(b). Permissive intervention is appropriate. See 3B Moore's Federal Practice §24.10[5] and cases cited therein.

I should also remind the court that none of the present parties have raised any objection to this motion.

WHEREFORE, your deponent respectfully requests that the motion to intervene be granted.

s/ A. Seth Greenwald
A. SETH GREENWALD

Sworn to February 6, 1974

ANSWER OF LOUIS J. LEFKOWITZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Intervenor herein, for his pleading in intervention alleges as follows:

Answer of Louis J. Lefkowitz

FIRST: That pursuant to Executive Law § 71 of McKinney's Laws of New York, the Attorney General has an interest and obligation to uphold the constitutionality of state statutes.

SECOND: Except by this intervention, neither the State of New York the Attorney General thereof, or any agency or officer or employee of the state is a party hereto.

THIRD: The plaintiffs' complaint has drawn in question the plaintiffs' claim that Uniform Commercial Code, §§ 7-209, 7-210 are unconstitutional on stated grounds.

FOURTH: This statute of the State of New York affects the public interest and the public interest would be greatly prejudiced if the contention that said act is unconstitutional were sustained.

FIFTH: Denies knowledge or information sufficient to form a belief as to each and every allegation but denies paragraphs 28, 29 and 30 namely that U.C.C. §§ 7-209, 7-210 are unconstitutional.

FOR A FIRST DEFENSE

SIXTH: Denies that the court has jurisdiction over the subject matter of this complaint.

SEVENTH: The statute does not authorize seizure of property. The defendants have lawful possession.

EIGHTH: There is no state action involved in the execution of the lien by non-judicial sale.

Answer of Louis J. Lefkowitz

FOR A SECOND DEFENSE

NINTH: The challenged statute provides notice and an opportunity to be heard before sale. Due process is provided by the requirement for notice before sale.

FOR A THIRD DEFENSE

TENTH: The action is inappropriate for class action relief as the plaintiffs' demands may result in a situation adverse to the interests of many consumers — availability of moving services only on pre-payment — and notice would be impossible.

WHEREFORE, the Attorney General of the State of New York respectfully requests that the complaint be dismissed.

LOUIS J. LEFKOWITZ

A. SETH GREENWALD

ANSWER OF FLAGG BROTHERS, INC. AND HENRY FLAGG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated and HENRY FLAGG, individually and as President of Flagg Brothers, Inc. for their answer to the complaint allege:

1. Admit the allegations contained in Paragraph "1" of the complaint except denies that New York Uniform Commercial Code Section 7-209 and 7-210 violate any provision of the United States Constitution; admit the allegations contained in Paragraphs "10", "11", "20", "22", "23" and "24" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to Paragraphs "9", "12", "13", "17" and "18".

3. Deny each and every allegation contained in Paragraphs "2" through and including "8", "14", "15", "16", "19", "25" and "26" through and including "31" of the complaint.

FIRST DEFENSE

4. The complaint fails to state a claim upon which relief can be granted, in that the plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to a foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets with the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and whereas the amount actually in controversy as to the named plaintiff's claim is less than TEN THOUSAND ($10,000.00) DOLLARS exclusive of interest and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the plaintiff complains consisting of the alleged detention of plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

WHEREFORE, Defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, respectfully request:

(1) That the Court enter judgment dismissing the actions in 73 Civ. 4050 upon the following grounds:

(a) the complaint fails to state a claim upon which relief can be granted;

(b) the Court lacks subject matter jurisdiction over either action;

(c) the required state action under the 14th Amendment is lacking;

(2) That the Court enter judgment finding Sections 7-209 and 7-210 of the Uniform Commercial Code of the State of New York to be constitutional under the due process and equal protection clauses in Amendment XIV to the United States Constitution;

(3) That the Court grant no relief to plaintiff or any others similarly situated whom either plaintiff seeks to represent.

(4) That the Court grant Defendants such other and further relief as may be proper.

Dated: New York, New York
March 29, 1974

s/ Alvin Altman
ALVIN ALTMAN

CLASS ACTION STIPULATION (PLAINTIFF CLASS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that this consolidated action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the plaintiff class consists of all persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due without prior notice and an opportunity for a judicial hearing prior to the imposition of the lien and the sale of the goods.

This action is a proper class action because: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law common to the class, namely the constitutional validity of the New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the claim of the representative plaintiffs are typical of the claims of the members of the class; (d) The Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard prior to the imposition of a lien on and sale of plaintiffs' property, have acted and refused to act on grounds generally applicable to the class.

This action is a proper class action only with respect to plaintiffs' claims for injunctive and declaratory relief and not with respect to plaintiff Brooks' claim for damages or to plaintiff Morant's claim for damages.

Class Action Stipulation (Plaintiff Class)

[subscriptions of attorneys omitted in printing]

DATED: February 1974

SO ORDERED:

U. S. DISTRICT COURT JUDGE

CLASS ACTION STIPULATION (DEFENDANT CLASS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the parties in the above entitled action that this consolidated action is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

The members of the defendant class consist of all warehousemen, as defined by New York Uniform Commercial Code §7-102 (h), doing business in the State of New York who impose liens upon goods stored with such warehousemen pursuant to Section 7-209 of the New York Uniform Commercial Code and who subject such goods to sale pursuant to Section 7-210 of the New York Uniform Commercial Code without affording the owner of the goods notice and an opportunity for a judicial hearing prior to imposition of the lien and the sale of the goods.

This action is a proper class action because: (a) the defendant class, consisting of approximately 200 to 300 warehouses located within the State of New York, is so numerous that joinder of all members is impracticable; (b) there

are questions of law common to the class, namely, the constitutional validity of New York Uniform Commercial Code §§ 7-209 and 7-210; (c) the defenses and claims of the representative defendants are typical of the claims of the members of the class; (d) the law firm of Brodsky, Linett and Altman as attorneys for defendants Flagg, Flagg Brothers, Inc., and for Intervenor-Defendant New York State Movers & Warehouseman's Associates, Inc., will adequately protect the interest of the defendant class; and (e) the party opposing the class has acted on grounds generally applicable to the class thereby making appropriate declaratory relief with respect to the class as a whole.

[Subscriptions of attorneys omitted in printing]

DATED: February 1974

SO ORDERED:

U.S. DISTRICT COURT JUDGE

NOTICE OF MOTION TO INTERVENE: GLORIA JONES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

TO THE DEFENDANTS:

PLEASE TAKE NOTICE that GLORIA JONES will bring on for hearing before the United States District Court in Room 7 of the United States Courthouse, Foley Square, New York, New York, on the 29th day of April, 1974, at or as soon thereafter as counsel may be heard, a motion for an order

permitting Gloria Jones to intervene in this action, individually and on behalf of all others similarly situated, pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure as party plaintiff.

The grounds of this motion, as are more fully set forth in the proposed intervenor-plaintiff's complaint, are that the proposed intervenor is a member of the class purported to be represented by the named plaintiff and that the proposed intervenor's claims and the claims of the named plaintiff contain identical questions of law, i.e., the constitutionality and validity of New York Uniform Commercial Code, §§7-209 and 7-210. Permitting the applicant to intervene will not unduly delay or prejudice the adjudication of the rights of the original parties.

PLEASE TAKE FURTHER NOTICE that opposing affidavits and answering memoranda must be served upon counsel for plaintiffs at least three days before the return day of this motion.

Dated: April 11th, 1974.
White Plains, N.Y.

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
BY:
LAWRENCE S. KAHN, Of Counsel
MARTIN A. SCHWARTZ, Of Counsel
GENE B. REIBMAN, Of Counsel
Attorneys for Plaintiffs

INTERVENOR'S COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

I.
PRELIMINARY STATEMENT

1. This is a class action for injunctive and declaratory relief and damages brought pursuant to 42 U.S.C. §1983. Plaintiffs challenge the constitutionality of New York Uniform Commercial Code, §§7-209 and 7-210 on the grounds that these statutes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution in that they grant a warehouseman a lien and the right to sell stored goods for warehouseman's fees allegedly due without granting the owner of the stored goods an opportunity for a hearing prior to the imposition of the lien and sale.

II.
JURISDICTION

2. Jurisdiction is conferred on this Court by 28 U.S.C. §1343(3) which provides for the original jurisdiction of this Court in suits brought under color of any State statute, ordinance, regulation, custom or usage to redress rights, privileges and immunities secured by the United States Constitution without regard to the amount in controversy.

3. Plaintiffs' request for injunctive relief and damages is authorized by 42 U.S.C. §1983. Plaintiffs' request for a declaratory judgment is authorized by 28 U.S.C. §§2201 and 2202.

Intervenor's Complaint

III.
CLASS ACTION ALLEGATIONS

A. Plaintiff Class

4. Plaintiffs are members of a class of persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

5. This class action is properly brought pursuant to Rule 23 of the Federal Rules of Civil Procedure because: (a) the class is so numerous that joinder of all members is impracticable. There are numerous persons whose property is stored in a warehouse in the State of New York whose property has been encumbered by a lien and subject to sale without a prior opportunity to be heard; (b) there are questions of law and fact common to the class, namely, the constitutional validity of New York Uniform Commercial Code, §§7-209 and 7-210; (c) the claims of the representative plaintiffs are typical of the claims of the members of the class and it can reasonably be expected that defendants will interpose identical defenses to such claims; (d) the Legal Aid Society of Westchester County, attorney for plaintiffs, will fairly and adequately protect the interests of the class; and (e) defendants, in failing to provide plaintiffs with an opportunity to be heard, have acted and refused to act on grounds generally applicable to the class.

B. Defendant Class

6. Defendant Flagg Brothers is a representative of a class of defendants, all of whom are warehousemen doing business in the

State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 without affording the owner of the goods a prior opportunity to be heard.

7. This class is so numerous that joinder of all members is impracticable. The issue of law presented by this action is common to all members of the defendant class and the defendant has acted and refused to act on grounds generally applicable to the class. In addition, the prosecution of separate actions against individual members of the defendant class could create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the members of the defendant class; adjudications with respect to the individual members of the defendant class as a practical matter would be dispositive of the interests of the other members of the defendant class; the questions of law and fact common to the members of the class predominate over any questions affecting individual members, and a class action is superior to other available methods for the fair and different adjudication of the controversy.

IV.
PARTIES

8. Plaintiff GLORIA JONES is a citizen of the United States and of the State of New York. Plaintiff resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is employed by the Burlington Fabrics Company, Mount Vernon, New York, for which her take home pay is approximately $87.00 per week. This is the sole source of plaintiff's income.

9. Defendant Flagg Brothers, Inc., is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of

New York. Defendant maintains an office and is engaged in business at 247 South Fifth Avenue, Mount Vernon, New York.

10. Defendant Henry Flagg is President of defendant Flagg Brothers, Inc. He is being sued individually and in his official capacity.

V.
FACTUAL ALLEGATIONS

11. In the fall of 1973, plaintiff and her family were residing at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshall of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

12. When City Marshall James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshall Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store her goods.

13. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

14. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

15. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

16. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

17. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars (see Exhibit "A", annexed hereto). Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believes that she does not owe defendants the amount they are charging her, but in any event plaintiff cannot afford to pay defendants this amount.

18. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued detention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed hereto as Exhibit "B". Defendants have threatened to sell these goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity to be heard. The sale

of these goods wihout a prior hearing will cause plaintiff and her family further grave and irreparable injury in that the goods being sold by defendant Flagg Brothers constitute essential items of household furniture which plaintiff, because of her limited income of approximately $87.00 per week, cannot afford to replace.

19. The imposition of a warehouseman's lien pursuant to New York Uniform Commercial Code §7-209 and the threatened sale of the goods pursuant to New York Uniform Commercial Code §7-210 are actions under color of state law in that they are actions fostered and authorized by New York State statutes and are activities traditionally carried out by public officials and thus constitute public functions.

VI.
LEGAL CLAIMS

20. Defendants' imposition of a lien on plaintiff's goods pursuant to New York Uniform Commercial Code §7-209 and threatened sale of plaintiff's goods pursuant to New York Uniform Commercial Code §7-210 without affording plaintiff an opportunity for a prior hearing violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

21. New York Uniform Commercial Code §§7-209 and 7-210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that they authorize the encumbrance of a lien and the sale of goods stored in a warehouse for warehouse charges allegedly due without affording the owner of the goods an opportunity to be heard.

22. New York Uniform Commercial Code §§7-209 and 7-210 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that these

statutes have the effect irrationally and arbitrarily discriminating against persons of low income. Persons with means can pay the amount of alleged debts for warehouse moving and storage and contest the legality of the debt in subsequent legal proceedings, thereby obtaining their goods. Low income persons such as plaintiff do not have this option and cannot prevent the imposition of the statutory lien and sale without an opportunity to be heard.

WHEREFORE, plaintiff respectfully prays on behalf of herself and all others similarly situated that this Court:

1. Assume jurisdiction of this action and issue a preliminary and permanent injunction:

(a) Enjoining defendants, their officers, employees, agents and successors from encumbering plaintiff's goods and selling these goods without affording plaintiff an opportunity to be heard;

(b) Enjoining defendants, their officers, employees, agents and successors from enforcing New York Commercial Code §§7-209 and 210 without affording plaintiff an opportunity for a hearing prior to the imposition of a lien or the sale of goods placed by an owner in a warehouse.

(c) Mandate defendants, their officers, employees agents and successors to provide plaintiffs with an opportunity for a hearing prior to the imposition of a lien and sale of goods placed by an owner in a warehouse.

2. Enter a final judgment declaring defendants' imposition of a lien and threatened sale of plaintiffs' goods and New York Uniform Commercial Code §§7-

209 & 7-210 unconstitutional in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

3. Enter a final judgment awarding plaintiff $3,000 actual and nominal damages against the defendants jointly and severally.

4. Determine this to be a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

5. Award plaintiffs their costs, disbursements and attorneys' fees.

6. Award plaintiffs such other, further and alternative relief as to this Court may be just and proper.

Dated: April 11th, 1974
White Plains, New York

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY

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EXHIBITS TO INTERVENOR'S COMPLAINT

EXHIBIT A — NOTICE OF BILL

If she p/u charges are:

75.00 — platform chg.
35.00 — Legal Fees
225.00 — Storage Due
$335.00

If Flagg Bros. Moves You:

165.00 — moving est.
35.00 — Legal Fees
75.00 — platform
225.00 — Storage
$500.00

EXHIBIT B — LIST OF HOUSEHOLD GOODS

1. 2 Full size beds

2. 2 long dressers

3. Dining room table and 6 chairs

4. Hutch

5. 3 piece Wicker Chair set

6. 2 mirrors

7. 2 end tables

8. Gas stove

9. Refrigerator

Exhibit B

10. Cabinet for dishes

11. Clothes

12. Lamps

13. Carpet

— Other goods

NOTICE OF MOTION TO INTERVENE: TWO ASSOCIATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ARNOLD H. SHAW, sworn to April 11, 1974, the undersigned will make a motion for leave to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure at Room 2904, the United States Courthouse, Foley Square, New York, New York 10007 on the 24th day of April, 1974 at 10 o'clock in the forenoon or as soon thereafter as counsel may be heard for an order allowing the Warehousemen's Association of the Port of New York, Inc., and the Cold Storage Warehousemen's Association of the Port of New York to intervene in defense of the constitutionality of Uniform Commercial Code Sections 7-209 and 7-210, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 11, 1974

Yours, etc.

JAFFE, SHAW &
ROSENBERG,
Attorneys for the
Warehousemen's Association
of the Port of New York, Inc.
and the Cold Storage
Warehousemen's Association of
the Port of New York

(Service list omitted)

AFFIDAVIT OF ARNOLD H. SHAW IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am a member of the firm of Jaffe, Shaw & Rosenberg, attorneys for the movants hereinafter named and I make this affidavit in support of their motion to intervene.

The Warehousemen's Association of the Port of New York (hereinafter referred to as the "Association") is a membership corporation of the State of New York. The Cold Storage Warehousemen's Association of the Port of New York

(hereinafter referred to as the "Cold Storage Association") is an unincorporated association. The Association is a trade association consisting of many public warehousemen doing business in the City of New York and in the metropolitan New Jersey area who are engaged in the commercial warehousing business. These members store, handle and distribute merchandise, commodities and materials of every character and description. The Cold Storage Association is also a trade association. Its members do business in the same vicinity, and their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their storage. Both of the movants store, handle and distribute goods, wares, merchandise, materials and commodities primarily for and on behalf of merchants and other commercial and business entities who are engaged in interstate and international commerce. The movants' members are, accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the members of both movants are importers who store their goods in United States customs bonded facilities maintained by many of movants' members.

The main thrust of the complaint, is to achieve a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. It goes without saying, therefore, that an adjudication of invalidity on constitutional grounds would have consequences that far transcend the rights of the plaintiffs and the defendants, and would vitally affect the rights and interests not only of the members of the Association and the Cold Storage Association, but of all public warehousemen doing business in the entire metropolitan area and, indeed, in virtually the entire nation, the Uniform

Commercial Code having been adopted by all states, with the exception of Louisiana, and by the District of Columbia and the Virgin Islands. (5 Bender's U.C.C. Service, ¶ 11.05).

If Sections 7-209 and 7-210 are declared unconstitutional, the consequences to the commercial public warehouse industry would be devastating. From time immemorial, public warehousemen have depended upon the security of the warehousemen's lien in readily taking into their establishments for storage goods of every description from all types of bailors. Without the lien, warehousemen would, of necessity, be required to be selective, and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. This would not only ruinously curtail the business of every warehouseman, but it would seriously interfere with and disrupt trade, commerce and industry.

I recognize that the principal defendant herein, Flagg Brothers, Inc. has interposed a defense "individually and as representative of a class of all others similarly situated". It is respectfully submitted, however, that the members of the Association and the Cold Storage Association are not situated similarly to the defendant, Flagg Brothers, Inc. It is true that Flagg Brothers is a public warehouseman entitled to a warehousemen's lien and the enforcement thereof under the subject U.C.C. sections, but this is where the similarity ends. The defendant, Flagg Brothers, upon information and belief, is engaged in the storage and moving of furniture and household furnishings and as such, it deals primarily with members of the general public. The membership of the Association and the Cold Storage Association, however, as already indicated, differ from the defendant, Flagg Brothers, in that they deal primarily with goods that are in trade, commerce and industry. Therefore, the membership of the Association and the Cold Storage

Association is not adequately represented in the within action and yet, these members have a vital stake in the outcome of the litigation insofar as the issue of constitutionality of Sections 7-209 and 7-210 of the Uniform Commercial Code are concerned.

From all of the foregoing, it is clear that the moving parties' defense and the main action have a question of law in common and, accordingly, intervention is appropriate pursuant to Rule 24, FRCP.

It is the intention of the movants to limit their participation herein to the question of constitutionality. They do not intend to become involved in the other factual issues. The rights of the original parties, therefore, cannot conceivably be delayed or prejudiced.

WHEREFORE, I respectfully request that the motion of the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York to intervene be granted.

s/ Arnold H. Shaw
ARNOLD H. SHAW

Sworn to April 11, 1974

ANSWER OF TWO ASSOCIATIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

The Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York answering the complaint herein allege:

Answer of Two Associations

1. Deny each and every allegation contained in Paragraphs 1 through 4 of the complaint.

2. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5 through 27 of the complaint.

3. Deny each and every allegation contained in Paragraphs 28 through 30 of the complaint.

4. Deny having knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31 of the complaint.

FIRST DEFENSE

5. Section 7-209 and Section 7-210 of the Uniform Commercial Code do not offend the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution in that the bailor of goods stored in a warehouse is afforded ample opportunity to be heard for the purpose of contesting the validity of a lien and a sale by way of enforcement thereof inasmuch as reasonable notice and advertising in advance of the actual sale are required.

SECOND DEFENSE

6. This court lacks jurisdiction in that the matter in controversy may properly be brought before a state or local court where a full and adequate remedy is available to the individual plaintiff.

THIRD DEFENSE

7. The claim of unconstitutionality is frivolous, and its insertion in the complaint does not alter the fact that the amount

Answer of Two Associations

in controversy is less than $10,000.00, exclusive of interest and costs, and that the essential element of diversity is lacking.

FOURTH DEFENSE

8. The controversy herein relates exclusively to allegations of acts by private individuals and actions by agencies of the State of New York or of any of its political sub-divisions are not involved; therefore, the Fourteenth Amendment of the United States Constitution is inapplicable.

FIFTH DEFENSE

9. The action is inappropriate for a class action relief as the granting of plaintiffs' demand that Sections 7-209 and 7-210, Uniform Commercial Code be declared unconstitutional would directly affect commercial and refrigerated warehouses whose businesses are dissimilar to the business of the defendants but who are, nevertheless bound by and subject to Sections 7-209 and 7-210, supra.

SIXTH DEFENSE

10. The action is inappropriate for a class action for the further reasons that whereas, upon information and belief, the defendants and others similarly situated are engaged primarily in local and intrastate activity, the members of the commercial and refrigerated industry represented by movants are engaged primarily in interstate commerce, and, in addition, whereas the defendants and others similarly situated deal primarily with consumers and the general public, the members of the commercial and refrigerated industry represented by movants deal primarily with merchants and others engaged in industry and commerce, yet, a declaration of unconstitutionality of Sections 7-209 and 7-210, supra, would directly and adversely affect the commercial and refrigerated warehouses.

WHEREFORE, it is respectfully requested that the complaint herein to the extent that it seeks a declaration of constitutional invalidity of Sections 7-209 and 7-210 of the Uniform Commercial Code be dismissed.

JAFFE, SHAW
& ROSENBERG,

s/ Arnold H. Shaw
ARNOLD H. SHAW,
a Partner

NOTICE OF MOTION TO INTERVENE: AWA AND IARW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

PLEASE TAKE NOTICE that upon the points and authorities as set forth in the attached memorandum, the undersigned will move this Court at a Motion Term held at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, in Room 2904 thereof, on the 1st day of May, 1974 at Ten O'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting the above named applicant for intervention, leave to intervene as a party defendant.

Dated: New York, New York
April 17, 1974

WERNER & WEISS

s/ Martin Werner
MARTIN WERNER
Attorneys for Applicant
For Intervention

(Service list omitted)

MOTION TO INTERVENE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 24 of the Federal Rules of Civil Procedure, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., move for leave to intervene as Defendants in this action and as grounds for such motion, state as follows:

I.

This action is brought to declare that the warehouseman's lien under the New York Uniform Commercial Code §7-209 and §7-210 violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

American Warehousemen's Association is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the

national trade association for the public merchandise warehousing industry, having 478 members who operate warehouses in all states, except Hawaii, Mississippi, South Dakota and West Virginia. The member warehouses account for approximately 1,801,218,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States. The member warehouses provide warehouse and distribution services to business and industry.

III.

International Association of Refrigerated Warehouses, Inc., is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is the national trade association for the public refrigerated warehousing industry, having 218 member companies in the United States who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. The member warehouses account for about 567,000,000 cubic feet of public refrigerated warehouse space which comprises over 75% of the total public refrigerated warehouse space in the United States. The member warehouses provide warehouse and distribution services for manufacturers, processors and distributors of food products and other goods requiring refrigeration.

IV.

The Uniform Commercial Code has been adopted in 49 states and the District of Columbia, including the State of New York. The provisions of §§7-209 and 7-210 respecting the creation and enforcement of the warehouseman's lien apply to the warehousing business of the applicant's members in New York as well as the other states which have adopted the Uniform Commercial Code. The constitutionality of the lien provisions which govern innumerable warehousing transactions is a subject

in which the applicants have a vital and substantial interest. If the warehouseman's lien provisions of the UCC are held to be unconstitutional the adverse effect upon applicants' members would be substantial. Their interest in upholding the constitutionality of the involved provisions requires that they be permitted to assert their defenses to the instant action. Since their interests as public warehouses for commercial and industrial accounts may differ from the interests of the warehousemen of household goods the applicants' interests are not adequately represented by existing parties.

V.

The applicants' defenses to the claimed unconstitutionality of the warehouseman's lien provisions of the Uniform Commercial Code present questions of law and fact which are common to the main action. Applicants have a substantial interest in the resolution of these questions since a determination of unconstitutionality would cause substantial disruption to existing and long standing commercial relationships and practices. The intervention of applicants would not unduly broaden the issues involved in this proceeding or delay or prejudice the adjudication of the rights of the original parties.

WHEREFORE, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., request that their motion for leave to intervene in this action as party defendants be granted and that leave be granted to file the attached Answer instanter.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

Motion to Intervene

s/ William H. Towle
WILLIAM H. TOWLE
HARDMAN, BURKE,
KERWIN & TOWLE
Their Attorneys

s/ Martin Werner
MARTIN WERNER
DATED: April 17, 1974

ANSWER OF AWA AND IARW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

AMERICAN WAREHOUSEMEN'S and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., intervening defendants, answer the Complaint in this action as follows:

1. Admit that Plaintiff seeks class action status and the relief requested in paragraph 1 of the Complaint, but deny that New York Uniform Commercial Code Sections 7-209 and 7-210 violate any provisions of the United States Constitution.

2. Deny knowledge or information sufficient to form a belief as to paragraphs 9 through and including 26 of the Complaint.

3. Deny each and every allegation contained in paragraphs 2 through and including 8 and 27 through and including 31 of the Complaint.

Answer of AWA and IARW

FIRST DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted, in that the Plaintiff and all members of the represented class of plaintiffs as owners of warehoused goods are not constitutionally entitled to an opportunity for a judicial hearing prior to the imposition or foreclosure of a warehouseman's lien on the goods.

SECOND DEFENSE

5. That the New York Uniform Commercial Code Sections 7-209 and 7-210 afford a warehouse depositor such notice and opportunity to be heard as meets the requirements under the United States Constitution.

THIRD DEFENSE

6. The Court lacks jurisdiction over the subject matter of the action because jurisdiction is invoked on the ground that the action arises under the Constitution and Laws of the United States and the amount actually in controversy as to the named Plaintiff's claims is less than Ten Thousand Dollars ($10,000.00) exclusive of interests and costs.

7. The Court does not have jurisdiction over the subject matter of the action in the absence of the jurisdictional amount.

FOURTH DEFENSE

8. The acts of which the Plaintiff complains consisting of the alleged detention of Plaintiff's goods and those of all others similarly situated and their alleged forced sale without adequate notice and opportunity for a judicial hearing prior to lien sale, are in the nature of private acts by private individuals and do not partake of state action as required by the 14th Amendment of the United States Constitution.

WHEREFORE, Intervening Defendants, AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., respectfully request:

(1) That the Court enter judgment dismissing the actions in 73 Civ. 4050 upon the following grounds:

(a) the Complaint fails to state a claim upon which relief can be granted;

(b) the Court lacks subject matter jurisdiction over either action;

(c) the required state action under the 14th Amendment is lacking;

(2) That the Court enter judgment finding Sections 7-209 and 7-210 of the Uniform Commercial Code of the State of New York to be constitutional under the due process and equal protection clauses in Amendment XIV to the United States Constitution;

(3) That the Court grant no relief to Plaintiff or any others similarly situated whom Plaintiff seeks to represent.

(4) That the Court grant Intervening Defendants such other and further relief as may be proper.

Respectfully submitted,

AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.

WILLIAM H. TOWLE

MARTIN WERNER

DATED: April , 1974.

AFFIDAVIT OF ALVIN ALTMAN IN OPPOSITION TO JONES' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALVIN ALTMAN, being duly sworn, deposes and says:

1. I am associated with Brodsky, Linett and Altman, attorneys for defendants and have knowledge of the facts recited herein from my investigation of the case and conversations with defendant, HENRY FLAGG, president of the corporate defendant.

2. This affidavit is submitted in opposition to the motion of GLORIA JONES, for leave to intervene in the above action upon the grounds that the proposed intervenor, GLORIA JONES, (1) is not a proper party to represent the plaintiffs in this action, and (2) she has no justiciable claim against the defendants in common with the claims presented in the main action. It is further respectfully submitted that intervention would unduly delay and prejudice the rights of the original parties.

Affidavit of Alvin Altman in Opposition to Jones' Intervention

3. Both the main action and the intervenor's lawsuit challenge the constitutionality of N.Y. U.C.C. Sections 7-209 and 7-210, the warehousemen's lien laws of New York State under the U.S. Constitution. The Court cannot hear the proposed intervenor's lawsuit and this lawsuit cannot be maintained as a class action if the provisions of Sections 7-209 and 7-210, particularly the latter statute, were not followed in the proposed intervenor's case.

4. As alleged in the proposed complaint, defendants removed Mrs. JONES' belongings from the sidewalk in front of her apartment building at 353 Mundy Lane, Mount Vernon, New York, to storage in November, 1973, following her eviction from the apartment by a City Marshal. This was done with the knowledge, consent and approval of both Mrs. JONES and the Department of Social Services of Westchester County. The said Department paid defendants transportation charges for the removal and for one month's storage. A copy of a letter dated December 13, 1973 from the Department to defendants is annexed. After one month of storage, Mrs. JONES was personally responsible for the storage charges in an amount which she knew and which she refused to pay after due demand. Although defendant advised Mrs. JONES that her belongings could be sold for delinquency in payment, defendant did not at any time initiate the procedure required under Section 7-210 before a sale is authorized.

5. In point of fact, Mr. KAHN, attorney for the proposed intervenor has spoken with your deponent and I have advised him defendants have no intention of selling the goods and if defendants do so decide, I will inform him well in advance of any sale.

6. In the main action Mrs. BROOKS' goods have been returned to her in their entirety and the dispute to that extent has been settled. The only questions remaining therein are a

Affidavit of Alvin Altman in Opposition to Jones' Intervention

claim for damages in the amount of $500.00 for alleged wrongful detention of her belongings and the question of constitutionality of the challenged sections of the Uniform Commercial Code.

WHEREFORE, for the reasons stated in the accompanying memorandum of law defendants respectfully submit that the motion for intervention should be denied.

s/ Alvin Altman
ALVIN ALTMAN

Sworn to April 25, 1974

EXHIBIT TO AFFIDAVIT

(Reproduced as Exhibit E to affidavit of Henry Flagg, this Appendix, *infra*.)

AFFIDAVIT OF GENE F. REIBMAN IN OPPOSITION TO ASSOCIATIONS' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

GENE F. REIBMAN, being duly sworn deposes and says:

1. I am of counsel to the Legal Aid Society of Westchester County, the attorney for plaintiff Brooks and proposed plaintiff-intervenor Jones. I make this affidavit in opposition to the applications of The American Warehousemen's Association; the International Association of Refrigerated Warehouse, Inc.; the Warehousemen's Association of the Port of New York, Inc.; and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant.

2. It is apparent from a reading of the affidavits in support of the motions to intervene that said proposed intervenor-defendants have no "interest relating to the property or transaction which is the subject of [this] action" within the meaning of F.R. Civ. P. Rule 24(a)(2), nor, do they assert a "claim or defense" within the meaning of rule 24(b)(2).

3. Plaintiff has no objection to the proposed intervenors-defendants participating in this action as *amicus curaie*.

WHEREFORE, your affiant respectfully prays that the motions of The American Warehousemen's Association; the International Association of Refrigerated Warehouses, Inc.; the Warehousemen's Association of the Port of New York, Inc.;

and, the Cold Storage Warehousemen's Association of the Port of New York to intervene in this action as parties-defendant be denied.

Sworn to April 30, 1974

s/ Gene F. Reibman
GENE F. REIBMAN

(Service list omitted)

AFFIDAVIT OF LAWRENCE S. KAHN IN SUPPORT OF JONES' INTERVENTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

LAWRENCE S. KAHN, being duly sworn, deposes and says:

FIRST: I am an attorney on the staff of The Legal Aid Society of Westchester County and as such am fully familiar with the facts relating to the instant motion by Gloria Jones to intervene as a party plaintiff.

SECOND: Upon information and belief, on April 10, 1974, Gene B. Reibman, another staff attorney associated with The Legal Aid Society of Westchester County, telephoned Mr. Altman, an attorney associated with the firm of Brodsky, Linett

& Altman, attorneys for defendant herein, and advised him that The Legal Aid Society intended to move forthwith to intervene Gloria Jones as a party plaintiff. Mr. Reibman sought assurance from Mr. Altman that, pending a determination of Mrs. Jones' motion, her household goods would not be sold by the defendant. Mr. Altman responded that he would contact defendant Flagg Brothers to see if the latter would be willing to make such an assurance and that he would call Mr. Reibman back to inform him of the result of that conversation.

THIRD: Based upon that conversation, and based upon the fact that in the main action herein Mr. Altman had months earlier assured Mr. Reibman that the goods of the named plaintiff Brooks would not be sold pending the outcome of the action and had, in fact, subsequently arranged for the return of Ms. Brooks' goods, I assumed that, at least until Mr. Altman returned Mr. Reibman's telephone call, Mrs. Jones' goods would not be sold. It was this assumption which convinced me that there was no need to seek a temporary restraining order to prevent the sale of Mrs. Jones' household possessions.

FOURTH: On or about April 22, 1974, following the service and filing of the instant application, I telephoned Mr. Altman to inquire whether he would be able to provide assurance to me that Mrs. Jones' goods would not be sold. At that time he stated that he was able to give me such assurance and that Mrs. Jones' goods would not for the present be sold. Therefore, the fact that I did not seek a temporary restraining order on behalf of the proposed intervenor should not prejudice Mrs. Jones' motion to intervene as a party plaintiff.

s/ Lawrence S. Kahn
LAWRENCE S. KAHN

Sworn to May 1, 1974

DISTRICT COURT OPINION AND ORDER #40873 GRANTING INTERVENTION TO ALL MOVANTS, 63 F.R.D. 409 (S.D.N.Y. 1974)

(Reproduced in petition for certiorari in No. 77-37, at 47a.)

NOTICE OF MOTION FOR CLASS ACTION DETERMINATION AND FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

TO THE DEFENDANTS AND DEFENDANT-INTERVENORS:

PLEASE TAKE NOTICF that upon the annexed affidavits and the exhibits annexed thereto and upon defendant Flagg Brothers' answers to interrogatories, and upon all the papers previously filed in this action, plaintiffs and the plaintiff-intervenor will move this Court at a Motion Term to be held in Room 706 of the United States Courthouse, Foley Square, New York, New York, on the 9th day of September, 1974, at 10:00 A.M., or as soon thereafter as counsel can be heard:

1. For an order pursuant to Rule 23 of the Federal Rules of Civil Procedure determining this action to be a proper plaintiff and defendant class action;

The grounds of that motion, as are more fully set forth in the annexed affidavits, exhibits, the answers to interrogatories, and the memorandum of points and authorities submitted in support of this motion are that with respect to both the plaintiff and defendant classes, all of the requirements of Rule 23(a) are satisfied in that the class is so numerous that joinder of all members is impracticable, the questions of law and fact are

common to the class, namely, the constitutionality of New York Uniform Commercial Code, §§7-209 and 210, the claims and defenses of the representative parties are typical of the claims and defenses of the class, and the representative parties will fairly and adequately protect the interests of the classes. In addition, the requirement of Rule 23(b) is met in that the defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

2. For an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting plaintiff and the plaintiff-intervenor and the class they represent summary judgment for the injunctive and declaratory relief prayed for in the complaint and on all issues except the amount of damages.

The grounds of this motion, as are more fully set forth in the annexed affidavits and exhibits and in plaintiffs' memorandum of points and authorities in support of this motion, are that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law in that New York Uniform Commercial Code §§209 and 210 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that these provisions authorize the imposition of a lien and sale of bailed goods by a warehouse company without a prior hearing.

Plaintiffs further move pursuant to Rule 56(d) of the Federal Rules of Civil Procedure that if summary judgment is not rendered upon the whole case or for all the relief prayed for and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.

Notice of Motion For Class Action Determination and For Summary Judgment

PLEASE TAKE FURTHER NOTICE that answering memoranda and affidavits, if any, must be served on counsel for plaintiffs at least three days prior to the return date of this motion.

Respectfully submitted,

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

Dated: August 26, 1974
White Plains, New York.

AFFIDAVIT OF SHIRLEY HERRIOTT BROOKS IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

SHIRLEY HERRIOTT BROOKS, being duly sworn, deposes and says:

1. I am the plaintiff in this action, and I am a citizen of the United States and of the State of New York. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' motion for a class action determination and summary judgment.

Affidavit of Shirley Herriott Brooks in Support

1a. I reside at 120 North Kensico Avenue, White Plains, New York, with my three children, George, Jr., age 13, Tonya, age 12 and Michael, age 11. My husband died in an automobile accident approximately two years ago. I am employed as a homemaker for which I earn $2.50 per hour.

2. In the Spring of 1973, my family and I were residing at 33 North 3rd Avenue, Mount Vernon, New York. My landlord had obtained an order of eviction against me and on June 13, 1973, James A. Levister, the City Marshall of the City of Mount Vernon, New York, appeared at my residence to dispossess my family and I from our residence.

3. I informed Mr. Levister at that time, on June 13, 1973, that I wanted to call someone to store my furniture and other household possessions. Mr. Levister informed me that I would not be able to get anyone to store my furniture and that there was a man with him, defendant Henry Flagg, who would store my furniture. I was led to believe by Mr. Levister's comments that I had no choice but to let defendant Flagg store my goods.

4. I then asked defendant Flagg how much it would cost to move and store my goods. Defendant Flagg informed me that I would have to pay $65.00 per month for the moving and storage of the furniture. I told defendant Flagg that this sounded like a high price, but as I believed that I had no choice in the matter, I told defendant Flagg to proceed with the moving and storage of my furniture and household possessions.

5. After my goods were loaded on one of the defendant Flagg Brothers' trucks, a moving man told me that I would have to pay $178.00. I protested since I had been told that $65.00 was the entire cost. The moving man explained that I would have to pay $75.00 per month for storage, $75.00 for barrelling and platforming, and $28.00 for fumigating for a total of $178.00. I asked whether I had to have fumigating and the moving man

responded that fumigating was required. I believed that I had no choice in the matter but to pay and, after first insisting on payment in cash, defendant Flagg agreed to accept my check for $178.00.

6. After I was evicted, my children and I moved into my cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

7. On or about June 15, 1973, I called defendant Flagg Brothers in order to find out how long they would store my goods for the $178.00 payment. An employee of defendant Flagg Brothers informed me that I owed defendant Flagg Brothers an additional $156.00.

8. On or about June 19, 1973, I went to defendant Flagg Brothers' office in Mount Vernon, New York. I was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that defendant Flagg Brothers regarded the $178.00 payment as a "deposit" and that there was a "balance due" of $156.00. A copy of this Bill of Lading and Freight Bill is annexed hereto as Exhibit "A". I informed defendant Henry Flagg that his prices were unreasonable and that I couldn't afford to pay them. Defendant Flagg informed me that on the first day of July, 1973, I would owe an additional $75.00 for storage for the month of July. I told defendant Flagg that my one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed me that storage charges are incurred on a "per month" basis, and that even if my goods had been stored on June 29, 1973, an additional $75.00 would be due on July 1, 1973.

9. On or about June 29, 1973, I telephoned defendant Flagg. During the course of the telephone conversation, defendant Flagg offered to let me remove my goods by July 13,

1973 if I would pay the balance of the original bill allegedly then due in the amount of $156.00 plus $45.00. I restated my position to defendant Flagg that my original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, I was unable to remove my goods by July 13, 1973, because I was still sharing an apartment with my cousin and there was insufficient space in the apartment for my belongings.

10. Approximately one week later, in early July, 1973, I again telephoned defendant Henry Flagg, this time to arrange for a delivery date for my goods. Mr. Flagg's secretary gave me a date of August 14, 1973, and told me that I could obtain my possessions only if I paid $484.00 in cash. I was told that this amount included the past balance allegedly due. I then spoke to defendant Flagg and was told by him that payment has to be in cash and checks or money orders would not be accepted.

11. On or about August 25, 1973, I received a letter dated August 22, 1973, from defendant Flagg Brothers stating that:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due $156.00
> Storage for 7/73 & 8/73 $150.00 at $75. a month
>
> Total Due $306.00"

A copy of this letter is annexed hereto as Exhibit "B". Accompanying this letter from defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing me that unless payment on the storage account was made, defendant Flagg

Brothers would advertise my goods for public auction. A copy of this Notice is annexed hereto as Exhibit "C".

12. On August 24, 1973, I wrote to defendant Flagg Brothers detailing my position and claims regarding defendant Flagg's billing computations and methods. A copy of this letter is annexed hereto as Exhibit "D".

13. On August 23, 1973, my attorney wrote to defendant Flagg Brothers contesting defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed hereto as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to my letter, states in part that "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed hereto as Exhibit "F".

14. All of my goods stored consisted of essential items of household goods and furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed hereto as Exhibit "G".

15. Defendant Flagg Brothers' retention of my goods from June 13, 1973, to January 24, 1974, caused my children and I irreparable injury in that we were forced to do without all of the essential items of furniture and household goods set forth in Exhibit "G". My children and I were forced to sleep on the floor on the one remaining mattress that we had. We had to do without most of our clothes and were often forced to wear the same clothes day after day. We ate on paper plates, and had to buy duplicate pots and other household goods. Because my nurses uniforms were stored, I missed one and a half months of work. I had previously been working as a nurses aid earning a take home pay of approximately $100.00 per week. I did not have sufficient funds to buy duplicate uniforms. I finally saved

enough money to buy one uniform so I could return to work. In addition, my children and I had to do without curtains, shades and other household essentials.

16. On September 21, 1973, my attorney instituted this action for declaratory and injunctive relief and for damages against defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshal of the City of Mount Vernon, New York. By stipulation between my attorneys and the attorney for defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon me by reason of the storage of my goods with defendants from November 5, 1973, to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between my attorneys and the attorneys for defendants Henry Flagg and Flagg Brothers, Inc., I was permitted by defendant Flagg Brothers to remove, and did remove, all my goods from the defendant Flagg Brothers' warehouse.

WHEREFORE, your affiant respectfully prays that this Court grant her Judgment pursuant to F. R. Civ. P. 56, and grant for such other and further relief as to the Court may seem just and equitable.

s/ Shirley Herriott Brooks
Shirley Herriott Brooks

Sworn to August 15, 1974

EXHIBITS TO AFFIDAVIT

(Reproduced as Exhibits to Verified Complaint, this Appendix, *supra*.)

AFFIDAVIT OF GLORIA JONES IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: SS.:
COUNTY OF WESTCHESTER)

GLORIA JONES, being duly sworn, deposes and says that:

1. I am a citizen of the United States and of the State of New York. I am the plaintiff-intervenor in the above action. I have personal knowledge of all of the facts set forth herein. I make this affidavit in support of plaintiffs' and plaintiff-intervenor's motions for a class action determination and summary judgment.

2. I reside alone at 670 East Lincoln Avenue, Mount Vernon, New York. I am a recipient of public assistance.

3. In the fall of 1973, I resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against me in the City Court of Mount Vernon, and a warrant of eviction that had been issued against me by this Court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove my possessions and me from my apartment.

4. When City Marshal James A. Levister appeared on November 26, 1973, at my apartment to remove my possessions

and me, I tried without success to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom I should call to store my furniture and other household possessions. City Marshal Levister informed me that I could not get anyone to store my furniture and other possessions and that the man with him, an employee of defendant Flagg Brothers, Inc., was the man who would store my goods. Employees of defendant Flagg Brothers then loaded my household goods and furniture on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

5. I did not on November 26, 1973, and at no time thereafter, authorize defendant Flagg Brothers, Inc., to store my furniture and household possessions, either by written or oral contract, or otherwise. I was not advised of the rate I would have to pay for the storage of my goods.

6. After I was evicted from my apartment at 353 Muncy Lane, Mount Vernon, New York, I moved into my daughter's apartment at 616 East Lincoln Avenue, Mount Vernon, New York, and therafter into my son's house at 220 South 9th Avenue, Mount Vernon, New York. I now reside by myself in an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

7. In March, 1974, I contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that I would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire my household goods. I was informed by this employee that, if I had not contacted Flagg Brothers at that time, my goods would have been sold immediately thereafter. I had never been previously notified that such a sale would take place.

8. I subsequently complained to defendants that the price

they charged to move and store my goods was unreasonable, and that I had not contracted to pay Flagg Brothers any sum for the storage of my goods. Thereupon, an employee of defendant Flagg Brothers gave me a written notification that my bill was actually only Five Hundred Dollars, and that if I arranged to move my goods from Flagg Brothers' warehouse by my own means my bill would be reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed hereto as Exhibit "A". I was then informed by an employee of defendant Flagg Brothers that if I were unable to pay the entire bill by approximately April 12, 1974, my stored goods would be sold. I believe that I did not owe the amount defendants sought to charge me.

9. All of my furniture and household goods are presently in Flagg Brothers' warehouse. I have had to reside without them since November 26, 1973. A copy of a list of these goods is annexed hereto as Exhibit "B".

10. The deprivation of my furniture and other household goods has caused me substantial and irreparable injury in that:

a) As a result of the strain caused by being without furniture, I suffered a nervous breakdown, for which I was hospitalized, and continue to suffer from extreme nervousness;

b) I have not invited any friends into my home because of my embarrassment at having no furniture;

c) I have purchased fabric and other materials in order to make clothes to replace several of the articles of clothing that are being stored by defendants;

d) For several months after defendants took my furniture, I slept in one bed with my daughter's two

children, ages 3 and 6, and thereafter with my son's two children, ages 2 and 7.

e) Since November 26, 1973, I have had to live without most of my furniture, clothing and other possessions.

11. After my motion to intervene was filed in this action, my attorney received a letter dated May 21, 1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed hereto as Exhibit "C".

12. On June 5, 1974, an agreement was reached between my counsel and counsel for defendant Flagg whereby I would obtain my goods from defendant Flagg upon payment of $410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg reflecting this agreement is annexed hereto as Exhibit "D".

13. By letter from defendant Flagg's counsel to my counsel

dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. This letter states in part that "any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests." Although the attorney for Flagg Brothers alleges in the letter that on three occasions I arranged with Mr. Flagg to pick up my goods on a day certain, I in fact never made any such arrangements. A copy of the letter of June 28, 1974, is annexed hereto as Exhibit "E".

WHEREFORE, I respectfully pray that this Court grant plaintiffs' motions for a class action determination and summary judgment.

s/ Gloria Jones
GLORIA JONES

Sworn to August 1, 1974

EXHIBITS TO AFFIDAVIT

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EXHIBITS A AND B

(Reproduced as Exhibits A and B to Intervenor's Complaint, this Appendix, *supra.*)

EXHIBIT C — A. ALTMAN'S LETTER OF MAY 21, 1974

Brodsky, Linett and Altman
Counselors at Law
1776 Broadway
New York, N.Y. 10019

(212) Circle 5-7700

May 21, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall — Roosevelt Square
Mount Vernon, New York 10550

Attention: Lawrence S. Kahn, Esq.

Re: Gloria Jones v. Flagg Brothers, Inc., et al.

Dear Mr. Kahn:

This is in response to your letter dated May 16, 1974.

Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.

Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

Exhibit C

It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot.

Very truly yours,

BRODSKY, LINETT & ALTMAN

s/ Alvin Altman
Alvin Altman

AA:sf

cc: Flagg Brothers, Inc.

EXHIBIT D — LEGAL AID ATTORNEY'S LETTER OF JUNE 5, 1974

THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
MOUNT VERNON BRANCH OFFICE
CITY HALL — ROOSEVELT SQUARE
MOUNT VERNON, NEW YORK 10550

(914) MO 8-4045

June 5th, 1974

Brodsky, Linett & Altman
Counselors at Law
1776 Broadway
New York, New York 10019

Attention: Alvin Altman, Esq.

Re: Gloria Jones v. Flagg Brothers, Inc.

Dear Mr. Altman:

This is to confirm that, pursuant to your letter of May 21st and our telephone conversations of May 29th, 30th, 31st and

Exhibit D

June 3rd, Gloria Jones is paying Flagg Brothers, Inc., the sum of Four Hundred Ten Dollars ($410.00) in order to obtain the release of her household goods presently being stored by Flagg Brothers. Payment of this money is being made solely in order to obtain possession of those goods and in no way constitutes an admission that the sum being paid is the sum due. Payment is made under protest and is without prejudice to any claims Mrs. Jones may have against Flagg Brothers, Inc., its officers and its employees, including, but not limited to, those claims asserted in her proposed intervenor's complaint, filed with her motion to intervene in *Brooks v. Flagg Brothers, Inc.*, 73 Civ. 4050 (S.D.N.Y.).

Very truly yours,

s/ Lawrence S. Kahn
LAWRENCE S. KAHN
Attorney at Law

LSK:ksj

EXHIBIT E — A. ALTMAN'S LETTER OF JUNE 28, 1974

Brodsky, Linett and Altman
Counselors at Law
1776 Broadway
New York, N.Y. 10019

(212) Circle 5-7700

June 28, 1974

The Legal Aid Society of Westchester County
Mount Vernon Branch Office
City Hall — Roosevelt Square
Mount Vernon, New York 10550

Exhibit E

Attention: Lawrence S. Kahn, Esq.

Re: Jones v. Flagg

Dear Mr. Kahn:

We have attempted to cooperate with you in releasing your above-named client's furnishings to her based upon an understanding which you and I reached and presumably was agreed to by her.

Notwithstanding your good intentions, I must advise you that her good faith is open to serious question. During the course of the last month on three occasions she arranged with Mr. Flagg to have her goods picked up on a day certain. The removal of her goods from storage to platform from which point they are placed in a truck requires the use of labor and consequent expense. On each of the aforementioned three occasions, the last one being yesterday, June 27, 1974, Mrs. Jones failed to appear. This necessitated double labor in returning the goods to the warehouse.

In light of the above, any understanding we entered into must be considered nullified. Mr. Flagg will take whatever steps he deems necessary to protect his interests.

Very truly yours,

BRODSKY, LINETT & ALTMAN

s/ Alvin Altman
Alvin Altman

AA:sf

cc: Mr. Henry Flagg

PLAINTIFFS' STATEMENT PURSUANT TO RULE 9G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 9-G of the General Rules of this Court, plaintiffs submit the following as the material facts as to which there is no dispute.

A. Plaintiff Brooks

1. Plaintiff Shirley Herriott Brooks is a citizen of the United States and of the State of New York, and resides at 120 North Kensico Avenue, White Plains, New York, with her three minor children, George Jr., Tonya and Michael.

2. Defendant Flagg Brothers, Inc. is a corporation organized under the laws of the State of New York and is engaged in the business of moving and storage in the State of New York. Defendant Flagg Brothers, Inc. maintains an office and is engaged in the business at 247 South Fifth Avenue, Mount Vernon, New York. Defendant Henry Flagg is President of Defendant Flagg Brothers, Inc.

3. In the Spring of 1973, Plaintiff Brooks and her family were residing at 33 North Avenue, Mount Vernon, New York. Plaintiff's landlord had obtained an order of eviction against her and on June 13, 1973, James A. Levister, the City Marshal of the City of Mount Vernon, New York, appeared at her residence to dispossess Plaintiff Brooks and her family from their residence.

4. Plaintiff Brooks informed Mr. Levister at that time that she wanted to call someone to store her furniture and other household possessions. Mr. Levister informed Plaintiff Brooks

that she would not be able to get anyone to store her furniture and that there was a man with him, Defendant Flagg, who would store her furniture. Plaintiff Brooks was led to believe by Mr. Levister's comments that she had no choice but to let Defendant Flagg store her goods.

5. Plaintiff Brooks then asked Defendant Flagg how much it would cost to move and store her goods. Defendant Flagg informed Plaintiff Brooks that she would have to pay $65.00 per month for the moving and storage of the furniture. Plaintiff Brooks told Defendant Flagg that this sounded like a high price, but as Plaintiff Brooks believed that she had no choice in the matter, she told Defendant Flagg to proceed with the moving and storage of her furniture and household possessions.

6. After Plaintiff Brooks' goods were loaded on one of the Defendant Flagg Brothers' trucks, one of Defendant Flagg Brothers' moving men told Plaintiff Brooks that she would have to pay $178.00. Plaintiff Brooks protested, since she had been told that $65.00 was the entire cost. The moving man explained to Plaintiff Brooks that $75.00 per month was for storage, $75.00 was for barrelling and platforming, and $28.00 was for fumigating. Plaintiff Brooks then asked whether she had to have fumigating and the moving man responded that fumigating was required. Plaintiff Brooks felt then that she had no choice in the matter but to pay and after first insisting on payment in cash, Defendant Flagg agreed to accept Plaintiff Brooks' check for $178.00.

7. After Plaintiff Brooks and her family were evicted, they moved into Plaintiff's cousin's apartment at 120 North Kensico Avenue, White Plains, New York.

8. On or about June 15, 1973, Plaintiff Brooks called Defendant Flagg Brothers in order to find out how long they would store her goods for the $178.00 payment previously made.

An employee of Defendant Flagg Brothers informed Plaintiff that she owed Defendant Flagg Brothers an additional sum of $156.00.

9. On or about June 19, 1973, Plaintiff Brooks went to Defendant Flagg Brothers' office in Mount Vernon, New York. Plaintiff was there given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Defendant Flagg Brothers regarded the $178.00 payment as a "deposit" and that there was a "balance due" of $156.00. A copy of this Bill of Lading and Freight Bill is annexed to the Complaint and Plaintiff Brooks' Affidavit as Exhibit "A". Plaintiff informed Defendant Flagg that his prices were unreasonable and that she couldn't afford to pay them. Defendant Flagg informed Plaintiff that on the first day of July, 1973, Plaintiff would owe an additional $75.00 for storage for the month of July. Plaintiff told Defendant Flagg that her one month's storage payment of June 13, 1973, should run to July 13, 1973. Defendant Flagg informed Plaintiff that storage charges are incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional $75.00 would be due by July 1, 1973.

10. On or about June 29, 1973, Plaintiff Brooks telephoned Defendant Henry Flagg. During the course of the conversation, Defendant Flagg offered to let Plaintiff remove her goods by July 13, 1973, if she would pay the balance of the original bill allegedly then due in the amount of $156.00, plus $45.00. Plaintiff restated her position to Defendant Flagg that her original payment should cover the storage of the goods from June 13, 1973, to July 13, 1973. Furthermore, Plaintiff was unable to remove her goods by July 13, 1973, because she was still sharing an apartment with her cousin and there was insufficient space in the apartment for her belongings.

11. Approximately one week later, in early July, 1973,

Plaintiffs' Statement Pursuant to Rule 9(G)

Plaintiff Brooks again telephoned Defendant Henry Flagg, this time to arrange for a delivery date for her goods. Mr. Flagg's secretary gave her a date of August 14, 1973, and told her that she could obtain her possessions only if she paid $484.00 in cash. Plaintiff was told that this amount included the past balance allegedly due. Plaintiff then spoke to Defendant Flagg and was told by him that payment has to be in cash and that checks or money orders would not be accepted.

12. On or about August 25, 1973, Plaintiff Brooks received a letter dated August 22, 1973, from Defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from Moving due $156.00 Storage for 7/73 & 8/73 $150.00 at $75.00 a month Total bal. $306.00"

A copy of this letter is annexed to the Complaint and to the Affidavit of Plaintiff Brooks as Exhibit "B". Accompanying this letter from Defendant Flagg Brothers was a "Final Notice" noted August 22, 1973, informing her that unless payment on the storage account was made, defendant Flagg Brothers would advertise her goods for public auction. A copy of this Notice has been annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "C".

13. On August 24, 1973, Plaintiff Brooks wrote to Defendant Flagg Brothers detailing her position and claims regarding Defendant Flagg's billing computations and methods. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "D".

Plaintiffs' Statement Pursuant to Rule 9(G)

14. On August 23, 1973, Plaintiff Brooks' attorney wrote to Defendant Flagg Brothers contesting Defendant Flagg Brothers' constant change in warehouse fees allegedly due. A copy of this letter is annexed to the Complaint and to Plaintiff's Affidavit as Exhibit "E". Defendant Flagg's letter dated August 30, 1973, in response to Plaintiff Brooks' letter states in part: "Her storage bill is past due and must be brought up to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." A copy of this letter is annexed to plaintiff's affidavit as Exhibit "F".

15. All of plaintiff Brooks' stored goods consisted of essential items of household furniture. A list of these goods contained in "Household Goods Descriptive Inventory" prepared by defendant Flagg is annexed to Plaintiff's affidavit as Exhibit "G". Defendant Flagg Brothers retained plaintiff Brooks' goods from June 13, 1973, until January 24, 1974, causing plaintiff and her children to reside without the use of these goods, and causing them hardship and injury.

16. On September 21, 1973, plaintiff's attorney instituted this action for declaratory and injunctive relief and for damages against Defendants Henry Flagg and Flagg Brothers, Inc., and James A. Levister, City Marshall of the City of Mount Vernon, New York. By stipulation between Plaintiff's attorney and the attorney for Defendants Flagg and Flagg Brothers, Inc., it was agreed that no storage charge would accrue or be imposed upon Plaintiff Brooks by reason of the storage of her goods with the Defendants from November 5, 1973 to January 5, 1974, inclusive.

17. On January 24, 1974, pursuant to an agreement made between Plaintiff's attorneys and the attorneys for Defendants Flagg and Flagg Brothers, Inc., Plaintiff was permitted to and did remove all her goods from the Defendant's warehouse.

B. Plaintiff-Intervenor Jones

18. Plaintiff Gloria Jones is a citizen of the United States and of the State of New York. Plaintiff Jones resides alone at 670 East Lincoln Avenue, Mount Vernon, New York. Plaintiff is a recipient of public assistance.

19. In the Fall of 1973, plaintiff resided at 353 Mundy Lane, Mount Vernon, New York. Pursuant to a judgment of eviction that had been entered against plaintiff by the City Court of Mount Vernon, and a warrant of eviction that had been issued by said court, James A. Levister, City Marshal of the City of Mount Vernon, appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment.

20. When City Marshal James A. Levister appeared on November 26, 1973, to remove plaintiff and her possessions from her apartment, plaintiff unsuccessfully attempted to contact a caseworker at the Westchester County Department of Social Services to obtain advice as to whom she should call to store her furniture and other household possessions. Marshal Levister then informed plaintiff that she could not get anyone to store her furniture and other possessions and that the man with him, and employee of defendant Flagg Brothers, Inc., was the man who would store her goods. Employees of defendant Flagg Brothers then loaded plaintiff's goods on a truck owned by Flagg Brothers and proceeded to store them in a Flagg Brothers warehouse.

21. Plaintiff did not on November 26, 1973, and has never since authorized defendant Flagg Brothers, Inc., to store her furniture and household possessions, either by written or oral contract, or otherwise.

22. Plaintiff was never advised of the rate that she would have to pay for the storage of her household goods.

23. After plaintiff was evicted, she moved into an apartment at 670 East Lincoln Avenue, Mount Vernon, New York.

24. In March of 1974, plaintiff contacted defendant Flagg Brothers and was informed by an employee of Flagg Brothers that plaintiff would have to pay Flagg Brothers the sum of Six Hundred Dollars in order to acquire her household goods. Plaintiff was informed by this employee that if she had not contacted Flagg Brothers at that time, the goods would have been sold immediately thereafter. Plaintiff had never previously been notified that such a sale would take place.

25. Subsequently, plaintiff complained to defendants that the price they had charged her was unreasonable, and that she had not contracted to pay defendants any sum for storage of her household goods. Thereupon, defendants notified plaintiff that her bill was actually only Five Hundred Dollars, and that if she arranged to move her goods from defendants' warehouse by her own means the bill would be further reduced to Three Hundred Thirty-five Dollars. A copy of this notice is annexed to plaintiff Jones' affidavit as Exhibit "A". Plaintiff was informed that if she was unable to pay the entire bill by approximately April 12, 1974, her stored goods would be sold. Plaintiff believed that she did not owe defendants the amount they were charging her.

26. All of plaintiff's furniture and household goods are presently in defendant Flagg Brothers warehouse. Defendants continued retention of plaintiff's goods, all of which are essential items of household furniture, and the imposition of the statutory lien pursuant to New York Uniform Commercial Code §7-209 have resulted in plaintiff and her family having to reside without these items, thereby causing plaintiff and her family grave and irreparable harm. A list of these goods are annexed to plaintiff Jones' affidavit as Exhibit "B".

27. After plaintiff Jones filed her motion to intervene in this action, plaintiff Jones' counsel received a letter dated May 21,

1974, from counsel for defendant Flagg Brothers. This letter states in relevant part:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1 through May 31 at the rate of $75.00 a month plus $35.00 auctioneer's fees or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.
>
> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot."

A copy of this letter is annexed to plaintiff Jones' affidavit as Exhibit "C".

28. On June 5, 1974, an agreement was reached between counsel for Jones and counsel for Flagg Brothers providing for the release of Jones' goods upon Jones' payment of $410.00. A copy of the letter dated June 5, 1974, from my attorney to counsel for defendant Flagg is annexed to Jones' affidavit as Exhibit "D".

29. By letter from defendant Flagg's counsel to plaintiff Jones' counsel dated June 28, 1974, defendant Flagg repudiated the agreement in the letter of June 5, 1974. A copy of the letter of June 28, 1974, is annexed to Jones' affidavit as Exhibit "E".

Respectfully submitted,

THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

NOTICE OF CROSS-MOTION TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavits, and the exhibits annexed thereto and upon all the papers heretofore filed in this action, defendants FLAGG BROTHERS, INC. and HENRY FLAGG, will cross move this Court at a Motion Term to be held in Room 1603 of the U.S. Courthouse, Foley Square, New York, New York on the 16th day of October, 1974 at 10:00 A.M., or as soon thereafter as counsel may be heard for an order pursuant to Rule 12(b)(6) of the Federal Rules dismissing the action for failure to state a claim on which relief can be based.

The grounds of this motion as more fully set forth in the annexed affidavits and exhibits and in defendants' memorandum of points and authorities in support of the cross motion are that as a matter of law New York Uniform Commercial Code Sections 7-209 and 7-210 do not violate the due process clause of the 14th Amendment to the United States Constitution in authorizing imposition of a warehouseman's lien upon goods placed in storage and the enforcement of said lien in the event of default in payment of the storage charges and further that as a matter of law the requisite state action required under the 14th Amendment is lacking.

Dated: New York, New York
September 19, 1974

Respectfully submitted,

s/ Alvin Altman
BRODSKY, LINETT
& ALTMAN

AFFIDAVIT OF HENRY FLAGG IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HENRY FLAGG, being duly sworn, deposes and says:

1. I am a defendant in the above action and President of the corporate defendant FLAGG BROTHERS, INC. I have personal knowledge of all of the facts and circumstances recited herein. I submit this Affidavit in opposition to plaintiffs' motion for summary judgment and in support of a cross motion for dismissal of the complaints for failure to state a claim upon which relief can be granted.

2. Defendant FLAGG BROTHERS, INC. is a New York corporation engaged in the business of household moving and storage. It maintains an office and place of business at 174 West Lincoln Avenue, Mount Vernon, New York. It holds a Certificate No. NYC 826 issued by the Department of Transportation of the State of New York.

AS TO BROOKS CLAIM

3. On June 13, 1974 I was requested by James A. Levister, City Marshall of the City of Mount Vernon to accompany him to 33 North Third Avenue, Mount Vernon, New York for the purpose of making arrangements to remove the belongings of SHIRLEY BROOKS, the plaintiff herein, from her apartment in the said building to the sidewalk in front of said building. The plaintiff BROOKS was being evicted from her apartment pursuant to a

court order. My initial objective in visiting the apartment at that time was to determine the manpower needs for and the time of the actual removal of plaintiff's goods from the apartment to the sidewalk. In doing so, I was acting solely on behalf of the landlord through the Marshall.

4. On the date and time above specified in my presence the plaintiff BROOKS advised the City Marshall that she could not satisfy the judgment and accordingly the Marshall instructed the defendant FLAGG BROTHERS, INC. to proceed with the removal. My sole function at that time was at the direction of the City Marshal to act for the owner of the premises in effecting the removal of the plaintiff's belongings from her apartment to the sidewalk. That was the sum and substance of my job.

5. Upon realization that her possessions, if nothing further were to be done, would be left on the sidewalk, the plaintiff BROOKS then asked me whether I could arrange to move said furnishings to a warehouse for the purpose of storage. I stated that FLAGG BROTHERS, INC. maintains storage space and could accomodate the plaintiff at our usual rates in both the transporation and storage. I further specified to plaintiff BROOKS that she would have to pay the transportation charges together with accessorial charges for the removal from the sidewalk to the warehouse and in addition pay the storage charges. She requested an estimate and I gave her an oral estimate of $200 solely for the transportation phase of the job based upon a six hour moving job including loading and unloading. This charge was calculated upon our rates of $28 per hour for a van and three men and upon an estimate of a number of barrels and cartons to be used on the job. I further explained that her furnishings would be loaded into three containers for storage purposes; that our storage rates were $25 per month per container and consequently the entire monthly charge would be $75 per month. I explained to the plaintiff that the storage

charges did not run on a 30-day basis, i.e. from June 13, 1973 to July 12, 1973, but that industry practice was to charge for a full calendar month no matter what day of the month the storage was placed and the $75 charge therefor carried her until June 30, 1973; that on July 1, 1973 an additional $75 would be due for the period up until July 31, 1973. The plaintiff was well aware of all of these facets of the transaction at the time she authorized us to store her goods, and I might add that she was extremely pleased that we could and would store her goods. The alternative was leaving plaintiff's goods on the sidewalk after execution of the eviction order. The plaintiff BROOKS agreed to the above arrangement and at her specific direction we moved her furnishings to storage on June 13, 1973. Plaintiff paid $178 at that time on account.

6. A few days thereafter the plaintiff came to our office where she was given a Bill of Lading, annexed hereto as Exhibit "A". The Bill of Lading specifies each of the charges which were incurred in the removal. The Bill of Lading specifically sets forth storage charges of $75 per month. In addition, the plaintiff was given a Household Goods Descriptive Inventory List, annexed hereto as Exhibit "B", which sets forth the nature of her belongings placed in storage. We have used this type of documentation in eviction instances rather than a warehouse receipt. The same information is recorded in both events.

7. At the end of June plaintiff telephoned me and for the first time expressed dissatisfaction with the monthly storage charge agreement. She further indicated that she would not be able to remove her belongings in the month of July. Plaintiff again called sometime in July and arranged with my secretary for an August removal date from storage. At that time she would have owed $156 (shown as the balance due on Exhibit "A", Bill of Lading) plus $150 for two months of storage (July and August, 1973).

8. Having received no additional payment of August 22, 1973, I sent the plaintiff a note requesting payment, attached as Exhibit "C", together with a Final Notice, attached as Exhibit "D".

9. Notwithstanding commencement of preliminary steps, we did not avail ourselves of the remedy of foreclosure of our Warehousemen's Lien as provided under the Uniform Commercial Code. Instead, pursuant to an agreement between the attorneys, we permitted the plaintiff to remove her goods from the warehouse on January 24, 1974 without payment of any charges for storage. In point of fact, the only amount the plaintiff paid was $178 as an advance against the transportation service incurred back on June 13, 1973 at the time of the removal of her belongings from the sidewalk to the warehouse.

10. The facts demonstrate that the plaintiff authorized and indeed encouraged our taking possession of her belongings for storage; that prior to our taking possession the rates and charges were fully explained to her and that she understood and consented thereto; that the Household Goods Descriptive Inventory List specifies three boxes to be stored and that the Bill of Lading specifies storage charges of $75 per month. There was agreement as to the charges at the time plaintiff urgently needed our services to safeguard her property; disagreement on part of plaintiff only occurred conveniently after the safety of her property was realized.

AS TO JONES CLAIM

11. On November 26, 1973 I accompanied the City Marshall to 353 Mundy Lane, Mount Vernon, New York to the apartment of the plaintiff GLORIA JONES who was being evicted pursuant to court order on that day. Again, the purpose of my visit was to determine the manpower needs for and the

time of the actual removal of plaintiff's goods from the apartment to the sidewalk. Also, again in so doing I was acting solely on behalf of the landlord through the City Marshall.

12. Plaintiff Jones called the Department of Social Services for the purpose of obtaining funds to pay the overdue rent and thereby satisfy the judgment. She told us that the request was refused, but that the Department would pay for the transportation of her belongings to our warehouse and for one month's storage. I confirmed this. I advised Mrs. Jones that her belongings would be stored in three (3) crates at a storage rate of $25.00 per crate per month and further that after the Department ceased storage payment, it would be her obligation. She stated that her belongings would not be in storage more than a month because she had another apartment ready for her occupancy.

13. Plaintiff Jones' statement on page 2 of her affidavit that she did not authorize Flagg Brothers, Inc. to storage her property is absurd. We loaded her belongings from her apartment to the truck in her presence and with her approval. If the loading was being done against her will or without her authorization, she could have called the authorities to stop us. The fact is she was present; she knew what was going on; and she requested us to perform the job that was going on.

14. Attached hereto as Exhibit "E", is a letter dated December 13, 1973 from the Department of Social Services to Flagg Brothers, Inc. authorizing payment of one month's storage charges for Mrs. Jones, and as Exhibit "F" a copy of a letter dated January 31, 1974 from the Department of Social Services to Mrs. Jones advising that it would not pay her storage charges thereafter incurred.

15. A Bill of Lading was issued on November 26, 1973 together with a Household Goods Inventory List specifying the

property of Mrs. Jones taken into storage. The storage charges are likewise specified on the Bill of Lading. These documents are annexed hereto as Exhibits "G" and "H" respectively.

16. Attached to plaintiff Jones' affidavit is Exhibit "A", purporting to be a notice which it is not. I do not know who prepared the original. It appears to be a scrap of paper showing the charges she owed as of March 31, 1974, i.e. a total of $335.00. This represents three months' storage at $75.00 per month, a platform charge for removal of $75.00 (this is the customary labor charge for transferring the storage lot from its place in the warehouse to the dock for pickup) and a $35.00 auctioneer's fee.

17. At no time did we advise Mrs. Jones that her storage bill was $600.00 or $500.00 or anything other than the actual amount incurred as of the date the information was given. I believe that she is confused and has included those figures the cost of actually moving her belongings from the warehouse to her new apartment together with the storage charges.

18. The fact is that from January 1, 1974 through September 30, 1974, Mrs. Jones owes Flagg Brothers, Inc. seven (7) months' storage at $75.00 per month, a platform charge of $75.00, and an auctioneer's fee of $35.00 making a total of $635.00.

19. On three occasions Mrs. Jones advised me that she would pay her storage bill for release of her goods, and we brought her storage lots to the platform on a day and hour specified by her, and on none of those occasions did she appear. This necessitated double labor by our employees for each occasion. See letter of my attorneys dated June 28, 1974 to Mrs. Jones' attorneys attached to her affidavit as Exhibit "E".

20. Mrs. Jones agreed to our charges and authorized us to

remove her belongings for storage. As long as she was of the belief that the Department of Social Services would pay for her charges, there was no dispute. After the Department notified her it would no longer pay the charges, Mrs. Jones decided that they were unreasonable.

WHEREFORE, it is respectfully prayed that plaintiff's motion for summary judgment be denied and that defendant's cross motion to dismiss for failure to state a cause be granted in all respects.

s/ Henry Flagg
HENRY FLAGG

Sworn to September 19, 1974

EXHIBITS TO AFFIDAVIT

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EXHIBITS A, B, C, D

(Reproduced as Exhibits A, G, B, and C to Verified Complaint (Class Action) respectively, this Appendix, *supra.*)

EXHIBIT E — SOCIAL SERVICES LETTER OF DECEMBER 13, 1973

COUNTY OF WESTCHESTER
DEPARTMENT OF SOCIAL SERVICES
DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

December 13, 1973

Flagg Brothers Moving & Storage
41 East 3rd Street
Mount Vernon, N.Y.

RE: Gloria Jones
353 Mundy Lane
Mount Vernon, N.Y.

Dear Sir:

Please be advised that we are only authorizing payment for one month's storage of client's furniture (11/26/73 thru 12/25/73). We will not be held responsible for any costs incurred if furniture is left in storage beyond this period.

Yours truly,

DIVISION OF FAMILY AND CHILD SOCIAL SERVICES

s/ C. Cookman
(Mrs.) C. Cookman
Employment Worker

EXHIBIT F — SOCIAL SERVICES' LETTER OF JANUARY 31, 1974

January 31, 1974

Ms. Gloria Jones
% G. Godwin
616 East Lincoln Avenue
Mount Vernon, N.Y.

Dear Ms. Jones:

Please be advised that the approval for the storage of your furniture has expired. We have no responsibility for your furniture, storage and or other fees.

This Agency will not be involved in relocating you into an unfurnished apartment. We recommend that you locate a furnished apartment or a furnished room.

Yours very truly,

DIVISION OF FAMILY AND
CHILD SOCIAL SERVICES

s/ C. Cookman
(Mrs.) C. Cookman
Employment Worker

CC: Flagg Brothers
CC/ew

G. Jones
Has to get in touch w/DSS

Combined Uniform Household Goods Bill of Lading and Freight Bill — New York Commercial Zone.

Pd 2/4/74

FLAGG BROS. TRUCKING SERV., INC.

N.Y.C.—M.T. No. 4½ EAST THIRD STREET MOUNT VERNON, N.Y. 10550

Phone 668-9261

4575-84 (8)

DSS Not Paying Any More

NAME Gloria Jones Tel.

FROM 353 Lundy Lane Apt.

Mt. Vernon, N.Y.

TO Storage Apt.

OTHER STOPS

MOVING DATE 11/26/73 DAY Monday TIME A.M. P.M.

TIME RECORD

Start 11 A.M. P.M. Customer Initials

Finish 6 A.M. P.M. Customer Initials

JOB HOURS 7

TRAVEL TIME ½

TOTAL HOURS 7½

MOVING RATE: 1 VANS 3 MEN @ $ 28.57 Per Job Hr., Plus ½ Hrs. Travel Time

ESTIMATE OR REMARKS

(Approx. estimate—packing date—Instructions on job—or other info.)

Dept. of Social Service

Mt. Vernon, N.Y.

Ms. Cookman

VALUATION

Customer (Shipper) is required to declare in writing the released value of the property. The agreed or declared value of the property is hereby specifically stated by the customer (shipper) and confirmed by their signature hereon to be NOT exceeding 30 (.) cents per pound per article unless specifically excepted. The Customer (Shipper) hereby declares valuations in excess of the above limits on the following articles:

Article	Value

IMPORTANT

(SIGN BEFORE START OF ANY SERVICE)

The Shipper, subject to and based on the rates, rules, regulations, and conditions in the carriers lawfully published tariff hereby orders the carrier to furnish transportation facilities and service described herein subject to all conditions herein contained including valuation agreed or declared and the conditions on the back hereof which are hereby agreed to by the Shipper and accepted for himself and his assigns. Unless credit arrangements are made in writing the Shipper agrees to pay charges in cash, money order, or certified check prior to complete delivery.

CUSTOMER: Gloria Jones

By:

MOVER: FLAGG BROS. TRUCKING SERV., INC.

By:

DELIVERY RECEIPT

Except as specific[illegible]ed hereon
All services and All article[illegible]n Good Condition

CUSTOMER: Gloria Jo[illegible]

By:

RATES and DESCRIPTION		CHARGES	
MOVING 7 hours @ $ 28.57 per hr.		196	00
OVERTIME hours @ $ per hr.			
CARTAGE cu. ft. @ $ per cu. ft.			
WEIGHT lbs. @ $ per lb.			
PIANO CHGS.			
OTHER Travel time		14	00
Barrels, packed @ $ each			
13 Barrels, loaned @ $ .30 each		39	00
Wardrobes @ $ each			
Cartons or boxes @ $ .57 each			
4 Matt Cartons @ $ 6.00 each		24	00
Other fumigating		2	00
Whse. Labor chgs.			
Storage chgs.		75	00
Other			
Insurance; shipper declares the full value of the shipment for the purpose of insurance to be: Amt. $ @ $ per $100.00			
TOTAL CHARGES		$ 356	00
Advance Deposit			
BALANCE DUE			

RECEIVED PAYMENT

MOVER FLAGG BROS. TRUCKING SERV., INC.

By

MOVER'S (Carrier) COPY TO BE RETAINED BY MOVER

TERMS: Charges Payable in Cash, Money Order, or Certified Check on Delivery.

FORM 252A MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N.Y. 11735

EXHIBIT G — BILL OF LADING (G. JONES)

107a

CONTRACTOR OR CARRIER

HOUSEHOLD GOODS DESCRIPTIVE INVENTORY

PAGE NO. | NO. OF PAGES

AGENT: Flagg Bros., Inc.

CARRIER'S REFERENCE NO.

OWNER'S GRADE OR RATING AND NAME: Gloria Jones

CONTRACT OR GBL NO.

ORIGIN LOADING ADDRESS: 353 Mundy Lane, Mt. Vernon, N.Y. | CITY | STATE

GOVT. SERVICE ORDER NO.

DESTINATION

VAN NUMBER

EXCEPTION SYMBOLS

BE-BENT, BR-BROKEN, BU-BURNED, CH-CHIPPED, CU-CONTENTS ? CONDITION UNKNOWN, D-DENTED, F-FADED, G-GOUGED, L-LOOSE, M-MARRED, MI-MILDEW, MO-MOTHEATEN, PBC-PACKED BY CARRIER, PBO-PACKED BY OWNER, R-RUBBED, RU-RUSTED, SC-SCRATCHED, SH-SHORT, SO-SOILED, T-TORN, W-BADLY WORN, Z-CRACKED

LOCATION SYMBOLS

1. ARM, 2. BOTTOM, 3. CORNER, 4. FRONT, 5. LEFT, 6. LEGS, 7. REAR, 8. RIGHT, 9. SIDE, 10. TOP, 11. VENEER

NOTE: *The omission of these symbols indicates good condition except for normal wear.*

ITEM NO.	CR. REF.	ARTICLES	CONDITION AT ORIGIN	EXCEPTIONS (IF ANY) AT DESTINATION
1	1	Dining table		
2	1	air conditioner		
3	1	stove		
4	1	refrigerator		
5	1	stereo		
6	1	kitchen cabinet		
7	3	rugs / padding		
8		record stand & records		
9		vacuum cleaner		
0		ironing board		
1		Lamps		
2	16	Barrels CU		
3		boxes CU		
4		Straw loveseat		
5	2	chairs		
6	2	end tables		
7	6	dining chairs	(4 Containers)	
8	1	coffee table		
9	1	club chair		
0	1	sofa		
1	1	break Front		
2	3	dressers		
3	4	nite stands		
4	4	lamps shades		
5	1	headboard		
6	4	pc. marbles		
7	2	mirrors		
8	2	boxsprings		
9	2	mattresses		
0		Long pole(not in Harrison)		

ITEM NO.	REMARKS/EXCEPTIONS

"We have checked all the items listed and numbered 1 to ____ inclusive and acknowledge that this is a true and complete list of the goods tendered and of the state of the goods received."

INVENTORY NUMBER

AT ORIGIN	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE	AT DESTINATION	CONTRACTOR, CARRIER OR AUTHORIZED AGENT (DRIVER) (SIGNATURE)	DATE
	OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE		OWNER OR AUTHORIZED AGENT (SIGNATURE)	DATE

AFFIDAVIT OF HENRY C. BRENGEL, JR. IN SUPPORT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

HENRY C. BRENGEL, JR., being duly sworn, deposes and says:

1. I am president of the New York State Movers and Warehousemen's Association, Inc., a non-profit membership corporation of the State of New York comprised of approximately 250 movers and warehousemen certificated to transport household goods either in intrastate commerce by the New York Department of Transportation or in interstate commerce by the Interstate Commerce Commission, or by both agencies. Approximately 98% percent of our members maintain warehouses for storage of household goods.

2. I am also president of Empire Storage Warehouse, Inc. located at 80 Duffy Avenue, Hicksville, New York, a certificated carrier of household goods in intra and interstate commerce. We have been in the business since 1904. We maintain a warehouse for the storage of household goods approximately 20,000 square feet in size at the above address and operate 14 pieces of equipment. I have 30 years experience in the moving and storage business and am fully knowledgeable of all of its phases.

3. The purpose of this affidavit is to apprise the Court of the industry practices in the storage of household goods with respect to all facets of an operation from the initial contact of the warehouseman to the final disposition of the storage lot in the event of foreclosure.

Affidavit of Henry C. Brengel, Jr. in Support

4. Although the exhibits annexed represent documentation of my company, the forms and procedures specified herein are typical of those utilized generally in the moving and storage industry.

5. When we are contacted by a customer who wants to storage his household effects we initially send a salesman to make a survey and give an estimate. Our charges are made upon a cubic foot basis. A copy of our estimate form is annexed as Exhibit "A".

6. If the customer decides to use our service the driver takes a storage contract with him on the day of the move for execution by the depositor. The storage contract which is annexed as Exhibit "B" provides the exact storage rates.

7. Upon receipt of the household effects at the warehouse we prepare an inventory list or warehouse receipt containing an itemization of the depositor's belongings. This document is annexed as Exhibit "C". The list is normally send to the customer a few days after his belongings have been stored.

8. We have been engaged by the Marshall of the District Court of Nassau County to effect evictions from apartment to sidewalk pursuant to court order. In those instances a local moving ticket is used for the apartment to sidewalk move and given to the Marshall. On these occasions we have been requested by the owner of the property to storage it at our warehouse instead of leaving it on the sidewalk. My driver takes a storage contract with him on these evictions anticipating such a storage request. The contract is executed by the owner at that time (Exhibit "B") and the inventory list (Exhibit "C") is sent a few days later. The procedure and documentation in essence is the same in the eviction storages as in the usual storage situations.

9. Normally after two months delinquency in payment of storage charges we begin to contact the customer for payment. We do not invoke the foreclosure provisions of the Uniform

Affidavit of Henry C. Brengel, Jr., in Support

Commercial Code for approximately 9 months to one year after non-payment. Then we follow the enforcement steps of the Section 7-210 of the Code to the letter in fact, we send not only the notice required under Section 7-210(2), (Exhibit "E"), but an additional notice form which is not required (Exhibit "F"). We also send the notices by registered or certified mail as required and additionally by regular mail which is not required. The reason for this dual mail use is to make absolutely certain the depositor receives the notice of sale in the event the registered or certified mail is not forwarded to a different address than that which was given to us.

10. The warehouseman does not resort to the sale of a depositor's belongings lightly. When he is ultimately required to because of a continuing and unremitting delinquency in payment by the depositor resulting in the non remunerative use of warehouse space, the industry practices following the Uniform Commercial Code insure ample notice and opportunity to protest. If the storage charges are in dispute, although it is difficult to contemplate such to be the case bonafidely since the charges are detailed in the contract, we would not sell if the depositor tendered the amount he believed to be owing because of the risk of being held liable for conversion under the Code.

s/ Henry C. Brengel, Jr.
HENRY C. BRENGEL, JR.

Sworn to October 2, 1974

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EXHIBITS TO AFFIDAVIT

LOCAL MOVING & STORAGE ESTIMATE

AGENT FOR: NORTH AMERICAN VAN LINES, INC.

80 DUFFY AVENUE
HICKSVILLE, N. Y. 11801

(516) 931-0010

Empire Storage WAREHOUSE INC

Local & Long Distance Moving
Storage — Packing
Rug Cleaning

Date of Estimate..... Packing Date..... Moving Date..... Phone.....

Name..... To .....

Address ..... Floor..... | Address..... Floor .....

City..... Apt..... | City..... Apt. .....

LOCAL MOVING PROPOSAL

Furnish .....Van and.....Men for.....Hours at.....Per Hour.

Extra Pickup-Drop Off - At ..... $.....

Piano (type)..... .....

Insurance $.....Valuation at $.....per hundred dollars .....

Other Services..... .....

STORAGE PROPOSAL

TOTAL $.....

CARTAGE TO WAREHOUSE { (In-Out).....Men for.....Hours at $.....per hour .....

WAREHOUSE LABOR { .....Lbs. at.....$.....per Lb. .....

.....Cu. Ft.....At $.....per Cu. Ft. .....

STORAGE { .....Lbs. at $.....per hundred per month .....

.....Cu. Ft. at $.....per cu. ft. " " .....

Insurance.....Valuation at $.....per hundred per month .....

Wrapping..... .....

Other Services..... .....

TOTAL $.....

REMARKS

The charges indicated herein are estimated charges only. I understand that all charges are subject to actual time plus travel or actual weight, whichever is applicable. I further understand that unless a greater value is declared herein by me, my goods are released to the carrier at a valuation of 30¢ per pound per article. I hereby agree to pay all charges by cash, certified check or money order upon delivery of my goods.

X

SHIPPER

MOVER

Date

PACKING PROPOSAL

.....Barrels at $..... per $.....

.....Carton 1½ cu. at $..... per .....

.....Carton 3 cu. at $..... per .....

.....Carton 4 cu. at $..... per .....

.....Carton 6 cu. at $..... per .....

.....Mattress ctn. at $..... per .....

.....Mattress bags at $..... per .....

.....Wardrobes at $..... per .....

.....Mirror ctn. at $..... per .....

TOTAL $.....

All charges must be paid in cash, money order, or cashier's check on delivery.

Form 257-S

MILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N. Y. 11735

EXHIBIT A — ESTIMATE FORM

CONTRACT FOR MOVING AND STORAGE SERVICES New York Standard Form—NYFWA Approved 1/54

WEIls 1-0010

EMPIRE STORAGE WAREHOUSE, Inc.

Storage-Local & Long Distance Moving-Packing-Crating-Shipping

80 DUFFY AVE. HICKSVILLE, L. I.,N. Y.

.....19.....

The customer designated below agrees to hire the above named company herein after referred to as the company and the company agrees to perform the services designated below at the price specified in this contract and subject to the terms and conditions printed on the reverse side which are made a part hereof.

The following service or services are to be performed for the account of

on.....19..... A.M. .....P.M. Preliminary Packing Date.....19..... .....A.M. .....P.M.

From.....Apt.....El. ☐ Phone.....

To.....Apt.....El. ☐ Phone.....

Goods to be stored at

Final charges to be determined by actual cubic measurement.

Estimated as follows:

STORAGE.....cu. ft. @.....¢ per cu. ft. per mo.

Silver.....

Vault Stge. per mo. $..... Rugs.....

Books.....

Piano Stge. per mo. $..... Grand.....

Upright.....

Cartage in .....cu. ft. @.....¢ per cu. ft.

Labor in.....cu. ft. @.....per cu. ft.

Piano cartage $..... Hoist chge. $.....

SPECIAL REMARKS.....

MOVING RATES: 8 A.M. to 5 P.M. Monday to Friday (Except Holidays)

.....Van and.....men @ $.....per hour

OVERTIME RATES:

.....Van and.....men @ $.....per hour

.....Hour traveling time will be charged each way to and from the job.

TERMS:—Cash. Driver will collect

Time Start.: .....A.M. .....P.M. Cus. Sig.....

Time Fin.: .....A.M. .....P.M. Cus. Sig.....

PACKING MATERIAL: RENTALS OR FURNISHING — RUG CLEANING — FUMIGATION

Estimated quantities — charge to be made for material actually used.

.....Barrels @ $.....Each	Book ctns. @ $.....Each	Misc......
.....Wardrobes @ $.....Each	Lamp Shade ctns.....Each	.....
.....Boxes @ ¢.....Each	Matt. ctns. @ $.....Each	.....
.....Crates @ $.....per cu. ft.	Paper & Pad @ $.....Each	.....

RUGS: Dust clean. @.....¢ per sq. ft.....Shampoo @.....per sq. ft.....Moth Proof @.....¢ per sq. ft.....

SPECIAL REMARKS.....

Rates are based on, and this contract is subject to the limits of liability set forth on reverse side of contract, unless excess valuation is declared herein and itemized list is furnished in writing by the customer and attached hereto.

TOTAL EXCESS VALUATION $..... @ $..... PER $100 . . . TOTAL $.....

It is agreed that this contract which includes terms and conditions printed on the reverse side hereof, shall constitute the entire agreement between the parties and no statement or promise not contained herein shall be binding or valid.

I have read this contract and the terms and conditions on the reverse side hereof and agree to all the said terms and conditions and acknowledge receipt of copy herewith.

Accepted for the Company

EMPIRE STORAGE WAREHOUSE, Inc.

By.....

.....
Customer's or Agent's Signature

.....
Permanent Address

SEE REVERSE SIDE FOR TERMS, CONDITIONS AND LIMITS OF LIABILITY.

HILBIN PRINTING, INC., 135 SCHMITT BLVD., FARMINGDALE, N. Y 11735 FORM 248

The customer and the company agree to the following terms and conditions:

1. OWNERSHIP OF PROPERTY: The customer has represented and warranted to the company that he is the legal owner or in lawful possession of the property and has the legal right and authority to contract for services for all of the property tendered, upon provisions, limitations, terms and conditions herein set forth and that there are no existing liens, mortgages or encumbrances on said property. If there be any litigation as a result of the breach of this clause customer agrees to pay all charges that may be due together with such costs and expenses including attorneys fees which this company may reasonably incur or become liable to pay in connection therewith and this company shall have a lien on said property for all charges that may be due them as well as for such costs and expenses.

2. PAYMENT: Storage accounts are due and payable monthly in advance. Interest will be charged on accounts unpaid for a period of three months after they become due. The company has a lien on all goods moved or stored to secure payment for charges for all services rendered. All charges must be paid in cash, money order, or certified check before delivery or transfer of goods deposited under this contract and no transfer of title will be recognized unless entered on the books of this company.

3. LIABILITY OF THE COMPANY. (a) The company when transporting to or from the warehouse for permanent storage acts as a private carrier only, reserving the right to refuse any order for transporting and in no event is a common carrier.

(b) This contract is accepted subject to delays or damages caused by war, insurrection, labor troubles, strikes, Acts of God or the public enemy, riots, the elements, street traffic, elevator service or other causes beyond the control of the company.

(c) The company is not responsible for any fragile articles injured or broken, unless packed by its employees and unpacked by them at the time of delivery and in no event shall the company be liable except for its own negligence. The company will not be responsible for mechanical or electrical functioning of any article such as but not limited to, pianos, radios, phonographs, television sets clocks barometers, mechanical refrigerators or air conditioners whether or not such articles are packed or unpacked by the company.

(d) No liability of any kind shall attach to this company for any damage caused to the goods by inherent vice, moths, vermin or other insects, rust, fire, water, deterioration or normal wear and tear.

(e) Unless a greater valuation is stated herein, the owner declares that the value in case of loss or damage whether arising out of storage, transportation, packing, unpacking, fumigation, cleaning or handling of the goods, and the liability of the company for any cause for which it may be liable for each or any piece or package and the contents thereof does not exceed and is limited to FIFTY DOLLARS ($50.00) or for the entire contents of each van or storage lot does not exceed and is limited to TWO THOUSAND DOLLARS ($2000.) upon which declared or agreed value the rates are based, the owner having been given the opportunity to declare a higher valuation without limitation in case of loss or damage from any cause which would make the company liable and to pay the higher rate based thereon, and in no event however shall the company be liable except for its own negligence.

(f) In the event the company shall be requested by the customer to engage the services of others with respect to the transportation, repair, cleaning or servicing of any article, the company shall act as agent for the customer and shall not be liable for any damage arising out of such services rendered by others and shall not be liable for failure to execute any instructions except for such instructions that are in writing and acknowledged in writing by the company. In the event goods are delivered to another carrier, the company shall not be liable for loss or damage for any cause to said goods unless exception is noted in writing on the Delivery Receipt of this Company when delivery is made.

(g) The company shall not be responsible for loss of or damage to any article contained in drawers, or in packages, cases or containers not packed and unpacked by the employees of the company unless such containers are opened for the company inspection and then only for such articles that are specifically listed by the customer and are receipted for by the company or its agent.

(h) In no event shall the company be responsible for loss or damage to documents, stamps, securities, specie or jewelry unless a special agreement in writing is made between the customer and the company with respect to such articles.

4. MINIMUM PERIOD FOR STORAGE: On storage accounts three months storage will be charged for any fraction of the first three months period. Thereafter one months storage rate will be charged for thirty days or less.

5. TERMINATION OF STORAGE: The company reserves the right to terminate storage of the goods at any time by giving the depositor thirty days written notice of its intention to do so and unless the depositor removes such goods within that period the company is hereby empowered to have the same removed at the cost and expense of the depositor. And upon so doing the company shall be relieved of any liability with respect to such goods therefore or thereafter incurred.

6. ADDRESS AND CHANGE: It is agreed that the address of the depositor of goods for storage is as given on the front side of this contract and shall be relied upon by the company as the address of the depositor until change of address is given in writing to the company and acknowledged in writing by the company and notice of any change of address will not be valid or binding upon the company if given or acknowledged in any other manner.

7. TIME FOR FILING CLAIM: (a) As a condition precedent to recovery, claims must be filed in writing with the company within ten days after delivery of property and suit or arbitration must be instituted within six months from the day when notice in writing is given by the company to the customer that the company has disallowed the claim or any part thereof.

(b) Where claims are not filed nor suit or arbitration instituted in accordance with the foregoing provision, the company shall not be liable and such claims will not be paid.

(c) The company shall have the right to inspect and repair alleged damaged articles.

8. GENERAL TERMS AND CONDITIONS: (a) If goods cannot be delivered in the ordinary way by stairs or elevator, the owner agrees to pay an additional charge for hoisting or lowering or other necessary labor to effect delivery. Customer shall arrange in advance for all necessary elevator and other services and any charges for same shall be met by the customer. Customer agrees to pay the hourly charge in this contract for waiting time caused by lack of sufficient elevator service.

(b) Packing or moving charges do not include the taking down or putting up of curtains, mirrors, fixtures, pictures, electric or other fittings, or the relaying of floor coverings or similar services but if such services are ordered a charge will be made therefor.

(c) Company will charge for labor and materials supplied on all access to goods in the warehouse.

(d) Platform charge will be made when goods are delivered to an outside truckman.

9. CORRECTION OF ERRORS: The depositor agrees that unless notice is given in writing to the company within ten days after the receipt of the inventory list accompanying the warehouse receipt and made a part thereof including any exceptions noted thereon as to the condition of the property when received for storage, the inventory list shall be deemed to be correct and complete.

10. CONTROVERSY OF CLAIM: Any controversy or claim arising out of or relating to this contract, the breach thereof, or the goods affected thereby, whether such claims be found in tort or contract shall be settled by arbitration law of the State of New York and under the rules of the American Arbitration Association, provided however, that upon any such arbitration the arbitrator or arbitrators may not vary or modify any of the foregoing provisions.

11. AGREEMENT: The contract represents the entire agreement between the parties hereto and cannot be modified except in writing and shall be deemed to apply to all the property whether household goods or goods of any other nature or description which the company may now or any time in the future store, pack, transport or ship for the owner's account.

113a

EXHIBIT C — WAREHOUSE RECEIPT FORM

WAREHOUSE RECEIPT

TERMS AND CONDITIONS

The customer and the company agree to the following terms and conditions:

STORAGE RATES DO NOT INCLUDE INSURANCE

Warehouse Receipt

Non-Negotiable

LOT NO.

ISSUED BY

Empire Storage Warehouses

Storage - Local & Long Distance Moving
Packing - Crating - Shipping
80 DUFFY AVENUE
HICKSVILLE, L.I., N.Y. 11801
Phone: (516) 931-0010

WAREHOUSE RULES

PLEASE READ

Present this Warehouse Receipt and a written order when any goods are to be withdrawn.

Reasonable notice is required for access to or delivery of goods.

Access to goods by appointment only.

A labor charge will be made for handling of and access to goods in the warehouse.

This Warehouse Receipt must be returned when all goods enumerated in the Schedule are to be withdrawn.

A platform charge will be made when goods are delivered to outside truckmen.

The final settlement of this account must be made in CASH, at this office. No checks will be accepted, upon withdrawal of goods unless certified.

FROM SIDE

DELIVERY RECEIPT

EMPIRE STORAGE WAREHOUSE Inc.

The undersigned hereby acknowledges the delivery and receipt of all property as listed and described in this warehouse receipt and/or any supplement thereto, except as noted herein. I further certify that all property so delivered is owned by me and the said delivery to me includes all property stored by the undersigned except as otherwise indicated herein in writing.

Signed _____

Customer or Agent's Signature

Date _____

ORDER FOR DELIVERY

EMPIRE STORAGE WAREHOUSE Inc.

Kindly deliver goods on this warehouse receipt to

_____

_____ on _____

_____

In case goods are delivered to truckmen other than the Company's Trucks, the responsibility of the Warehouse ceases when goods are delivered to said truckmen.

Goods for places where receipts are customarily refused or where no authorized person is present to sign for them, may be left at my risk.

Date _____ Signed _____

Customer or Agent's Signature

MEMBER OF

Empire Storage WAREHOUSE

Storage - Local & Long Distance Moving
Packing - Crating - Shipping
80 DUFFY AVENUE HICKSVILLE, L.I., N.Y. 11801
Phone: (516) 931-0010

Lot No. ..... Date of Issue ....., 19....

RECEIVED for the account of .....

for storage, the goods or packages enumerated below, and subject to the terms and conditions on the reverse side of this receipt, said goods stored in warehouse located at No. .....

EMPIRE STORAGE WAREHOUSE Inc.

By _____

Hall

DESCRIPTIVE SYMBOLS	EXCEPTION SYMBOLS	LOCATION SYMBOLS
B/W - BLACK & WHITE TV C - COLOR TV CP - CARDED PIECES PWC - PACKED BY OWNER T/ - CARTON DISASSEMBLED TWD - DISASSEMBLED BY OWNER PB - PROFESSIONAL BOOKS PL - PROFESSIONAL LIBRARY PP - PROFESSIONAL PAPERS	BE - BENT CR - CRACKED DN - DENTED CO - CHIPPED CU - CRATED & CON- TENTS UNKNOWN B - BROKEN F - FADED R - RUSTED L - LEAKS M - MARKED WT - WELDED WD - WATER STAINED O - OLDED RU - RUSTED SC - SCRATCHED SM - SMOKY SS - SPILLED T - TORN W - WORN OUT WHEN D - DAMAGED	1. ARM 2. BOTTOM 3. CORNER 4. FRONT 5. LEFT 6. LEGS 7. ROOF 8. RIGHT 9. SIDE 10. TOP 11. WINDOW 12. OTHER

NOTE: THE OMISSION OF THESE SYMBOLS INDICATE GOOD CONDITION EXCEPT FOR NORMAL WEAR.

SCHEDULE OF GOODS

IMPORTANT

Are your goods insured against fire?

Read your policy and see that it covers the goods in the building in which they are stored.

If not correct, please notify immediately.

SALE·NOTICE

LOT NO.····· ·····19

TO ····· ·····

····· ·····

····· ·····

Please take notice that in accordance with the Uniform Commercial Code has a lien upon the goods stored with it by you in your name or on your account (or in which you claim an interest).

An itemized statement of the claim showing the amount now due and the date or dates when it becomes due as follows:

The goods against which the lien of this Company exists consists of all personal and other property as scheduled in the storage warehouse receipt issued to you and numbered ····· and stored by you in your name or on your account in the warehouse of this Company.

We hereby demand that the amount of such claim as above stated and of such further claims as shall accrue shall be paid on or before the····· day of ····· If such claim is not paid within the time above specified the goods will be duly advertised for sale and sold at public auction at ····· on····· the ····· day of ····· 19···· commencing 10:30 A.M.

The proceeds of such sale will be applied to the payment of said lien, including the reasonable charge for notice, advertisement and sale; and in case any DEFICIENCY shall arise on said sale YOU WILL BE LIABLE THEREFOR and judgement be entered against you.

If for any reason the sale shall not be completed on the said date it will be continued on each succeeding····· at the same time and place until all the goods are sold or until the lien is satisfied.

In the event the above described property belongs to any person in the United States Services, in any capacity, notify our office immediately by registered mail, advising us the rank, file or division of service, so that adequate protection will be preserved for the interest of the party or parties in the United States Government service.

BY ·····

EXHIBIT F — FINAL NOTICE

FINAL NOTICE

.....*19*...

_____

_____

_____

.....

Your Storage Account, amounting to $..... is now seriously overdue, and we herewith request that you make a payment on same on or before .....

Unless such payment is made we will be obliged to advertise your goods for sale at public auction.

Thanking you for your immediate attention to this matter, we are

Very truly yours,

(Read other side)

DEFENDANTS' RULE 9(g) STATEMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern and Eastern Districts of New York, defendants, FLAGG BROTHERS, INC. and HENRY FLAGG, the opposing parties to plaintiffs' motion for summary judgment, submit the following statement of the material facts as to which it is contended that there exists a genuine issue to be tried:

A. The Brooks' Complaint

1. Whether plaintiff BROOKS' arrangement with defendant HENRY FLAGG for the removal and storage of her belongings was entered of her own accord or as a result of misleading representations.

2. The moving and storage rates the defendant FLAGG quoted to plaintiff BROOKS. Prior to removing her goods plaintiff BROOKS claims she was given a total charge of $65.00 for the moving and storage of her goods. Defendant HENRY FLAGG claims his company gave an estimate of $200.00 for the transportation phase of the job based upon an hourly rate for $28.00 for a van and 3 men and an estimate of the number of barrels and cartons to be used, plus $75.00 a month for storage.

3. Whether there was agreement between the plaintiff BROOKS and defendants as to the moving and storage rate.

4. Whether the plaintiff BROOKS' belongings were loaded by and transported to warehouse at the specific request of said plaintiff.

Defendants' Rule 9(g) Statement

5. Whether defendant FLAGG advised plaintiff that storage charges run for a calendar month, i.e., 1st to end of month and not any 30 day cycle, i.e. June 13 to July 13.

6. Whether defendants' charges were reasonable.

B. The Jones' Complaint

7. Whether the removal and storage of plaintiff JONES' belongings by the defendants was authorized by plaintiff.

8. Whether the Department of Social Services of Westchester County authorized defendant to transport plaintiff's goods and store for one month at Department's expense.

9. Whether plaintiff JONES was aware that the Department of Social Services authorized payment for transportation and storage of her belongings for one month.

10. Whether plaintiff JONES was advised that after one month's storage she would have to pay storage charges.

11. Whether plaintiff JONES was advised the rate for storage.

12. Whether defendants misrepresented the amount due and owing them from plaintiff JONES.

13. Whether plaintiff JONES agreed to pay all outstanding storage charges.

14. Whether defendants' charge for storage was reasonable.

Respectfully submitted,

s/ Alvin Altman
BRODSKY, LINETT & ALTMAN

AFFIDAVIT OF RICHARD M. POWELL IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF MARYLAND)
: SS.:
COUNTY OF MONTGOMERY)

RICHARD M. POWELL, being duly sworn, deposes and says that:

1. I am the President of the International Association of Refrigerated Warehouses (IARW). I have held my present position for 16 years. As President of IARW, I am responsible for the planning, organization, staffing, directing, and controlling, subject to broad policy control by the Board of Directors. My knowledge of the industry is based on 16 years of close association with the public refrigerated warehousemen, with their warehousing operations, and with other segments of the food industry which do business with them. I am authorized by IARW to submit this Affidavit.

2. IARW is a Not-For-Profit Corporation organized and existing under the laws of the State of Delaware, with principal offices at Washington, D.C. It is an international trade association for the public refrigerated warehousing industry, having, in the United States, 218 member companies who operate 432 public refrigerated warehouses in all states, except Alaska, Montana, New Hampshire and Wyoming. Of the IARW's 218 U.S. member companies, there are 27 warehouses located in the State of New York. The member warehouses account for about 567,000,000 cubic feet of public refrigerated warehouse space which comprises over 75% of the total public refrigerated warehouse space in the United States.

3. The public refrigerated warehouse industry provides storage and distribution services to manufacturers, processors and distributors of products requiring refrigeration. Typically, these products are mostly perishable foodstuffs, but they also embrace various commercial products which require refrigeration such as film, blood plasma, seeds, chemicals and plastics. The refrigerated warehouse provides freezing services as well as storage at a range of temperatures depending upon the nature of the product.

4. One of the principal functions of the public refrigerated warehouse is to provide economical distribution services for producers located throughout the country. Meat products from the Midwest, fruit and vegetables from Texas, fish from the Pacific Northwest, and a multitude of other products will be stored at a public refrigerated warehouse. The warehouse will distribute these products to stores, restaurants, institutions and other receivers in the territory surrounding the warehouse. The services accorded to such goods include break-bulk, consolidation, distribution of pool-cars, cartage, packaging, repairing, sampling, weighing, loading and unloading, and numerous other functions related to the economical storage and distribution of commercial goods.

5. The public refrigerated warehouse relies upon its lien as an essential contractual element in the conduct of its business. The local public refrigerated warehouse deals in a national market. It cannot be fully informed of the credit and status of businesses throughout the country, or, for that matter, the numerous foreign producers that store goods in commercial warehouses. In dealing with customers located in distant areas, it must rely upon the warehousemen's lien for its protection.

6. Producers rely upon public warehouses to permit them to expand into new markets. This is especially true of small, new

producers who must introduce their products into new markets by making test sales. The warehousemen's lien protects the warehouseman when these new products or their producers fail. The lien, however, allows the marketing of these products without the prepayment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies that may often own their own refrigerated warehouses.

7. The public refrigerated warehouse is typically a small, local, privately owned company. The 1967 Census of Business, Public Warehousing, B C 67-WS9, published by the U.S. Department of Commerce, Bureau of the Census, (the most recent publication) indicates that of the 749 refrigerated warehouses then operating, a total of 432 were warehouses of less than 500,000 cubic feet capacity (Table 19). Of these 749 warehouses, only 182 were located in metropolitan areas of 1,000,000 inhabitants or more (Table 17). The remainder were located in smaller communities. In terms of the State of New York with a total of 89 refrigerated warehouses, 22 were located in New York, New York and 6 in Buffalo, New York (Table 1 and Table 17). The remaining 61 warehouses were located in the smaller communities in New York State. Of the 749 refrigerated warehouses, only 142 had annual gross revenues of over $500,000.00 (Table 3). The refrigerated warehouse typically is a small, privately owned company who must deal with large, national corporations. These large food processors, meat packers, etc. have overwhelming resources and large staffs of lawyers and other experts. In disputes between the warehouseman and these large, national corporations, the lien is a vital protection for the warehouseman.

8. The nature of commercial warehousing is such that a steady flow of goods moves through the warehouse. The lien allows the warehouseman to perform essential services for the

goods and to release them prior to payment for such services since the lien is attaching to new goods of the customer that are entering the warehouse. This is a far different situation from the household goods warehouse who receives a person's household goods, stores them and releases them when the charges are paid. The commercial warehouse does not and cannot deal economically with each lot of goods as a separate, distinct unit. It is the existence of the warehousemen's lien that allows the economic free flow of goods through the warehouse.

9. Refrigerated Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they pre-pay freight charges for their customers or accept and pay for collect shipments. The lien allows them to make such payments and the commercial value of such arrangements is important. A food broker in New Jersey may buy a carload of foodstuffs from Texas F.O.B. origin, consigned to a refrigerated warehouse in New York. The warehouse will pay the collect freight charges relying on its lien. Absent the existence of the lien, such commercial flexibility would be difficult. The same situation exists in ordering out goods from a warehouse. A broker receives an order for immediate shipment, telephones the warehouse to ship the freight pre-paid and the warehouse can do so relying for payment upon the lien it has on other of the broker's goods. When dealing with perishable foodstuffs items, it is essential that goods move freely and quickly. The risk of spoilage and deterioration is high. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. The warehousemen's lien facilitates goods moving freely and easily in commerce.

10. There would be an adverse effect upon the nationwide marketing of foodstuffs items if the lien were held

unconstitutional. It is impossible to calculate the increased cost that would result but it would be another cost that would be added to the price of food.

s/ Richard M. Powell
RICHARD M. POWELL

Sworn to September 30, 1974

AFFIDAVIT OF DONALD E. HORTON IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

DONALD E. HORTON, being duly sworn, deposes and says that:

1. I am the President of the American Warehousemen's Association (AWA). I have served as Chief Administrative Officer of the Association since May 1, 1954. As President of AWA, I am responsible for the administration of the various activities of the Association which include, but are not limited to, educational programs for the industry, maintenance of library and reference sources dealing with all phases of physical distribution, handling of industry-customer relations, and industry-government relations. I serve subject to policies set forth by the Association's Board of Directors, as the official spokesman for the industry as represented by the Association.

Affidavit of Donald E. Horton in Opposition to Summary Judgment

I have been associated with the merchandise warehousing industry in various capacities since 1940 and with the American Warehousemen's Association since 1946. During these years it has been possible for me to develop an intimate knowledge of the industry through close association with the principals of merchandise warehousing companies and their customers, through study of their methods and functions, through the gathering and dissemination of statistical data, and through the planning and conducting of seminars and training programs dealing with all aspects of the conduct of the merchandise warehousing business. I have served various Governmental agencies in an advisory capacity in warehousing matters, among these agencies being the Hoover Commission, Department of Defense, General Services Administration, and the Interstate Commerce Commission.

I am authorized by AWA to submit this Affidavit.

2. AWA, established in 1891, is a Not-For-Profit Corporation organized and existing under the laws of the State of Illinois, with principal offices at Chicago, Illinois. It is the only national trade association for the public merchandise warehousing industry. It has 478 members who operate warehouses throughout the United States. Of the AWA's 478 members, there are 18 members located in the State of New York. The member warehouses account for approximately 1,800,000,000 cubic feet of warehouse space which represents about 75% of all public merchandise warehouse space in the United States.

3. The merchandise warehouse industry provides storage and distribution services to industrial and commercial accounts. The types of commodities handled by these warehouses range from consumer goods, such as drugs, toiletries, foodstuffs, appliances, clothing, etc., to the storage of manufacturers' parts, machinery, chemicals, etc. They do not include the storage of used household goods for individuals.

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4. One of the principal functions of merchandise warehousing is to provide storage and distribution services for manufacturers located throughout the country and in foreign countries. A typical merchandise warehouse will be storing a mix of products such as radios from Japan, television sets from Chicago, auto parts from Detroit, office machines from Boston, and a myriad of other products from various manufacturers.

A recent study by Professor Bernard J. La Londe of Ohio State University published by AWA in Warehousing Review, Vol. 2, No. 3, page 5 (May/June 1973), noted the following facts concerning the number of customers and product mix for the public merchandise warehousing industry:

NUMBER OF CUSTOMERS AND PRODUCTS STORED

Total Number of Customers

Total Number of Customers

Number of Customers	1967	1972
10 & Over	11.1%	6.5%
11 - 50	40.8	41.3
51 - 100	25.9	23.9
101 - 250	22.2	23.9
Over 250	-	44
Total	100.0%	100.0%

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Products Stored	Finished Goods: % of Respondents Handling Product	Finished Goods: Space Devoted to Product	Raw Materials: % of Res. Hand. Pro.	Raw Materials: Sp. Devoted to Product
Grocery Products	86.1%	36.6	13.9%	14.0%
Chemicals	70.9	14.5	21.5	37.6
Household Appliances	58.2	11.0	3.8	2.3
Machinery & Industrial Equipment	36.7	3.9	10.1	6.0
Automotive	35.4	5.7	5.1	12.0
Drugs & Health Supplies	32.9	2.8	1.3	1.2
Home Furnishings	26.6	2.6	3.8	2.9
Bldg Supplies/Hardware	24.1	2.2	6.3	2.9
Tobacco Products	20.3	3.5	-	-
Recreation Equipment	17.7	1.8	2.5	2.0
Alcoholic Beverages	13.9	1.3	-	-
Paper Products	12.6	4.7	3.8	12.4
School & Hospital	6.3	.7	1.3	1.2
Other	34.2	8.7	5.1	5.6
Total		100.0%		100.0%

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PERCENT OF PRODUCT STORED WHICH IS FINISHED GOODS

% Finished Goods	% Distribution of Responses
100%	34.2%
75-99	31.5%
50-74	23.7%
25-49	6.6%
Under 25%	4.0%
Total	100.0%

Unweighted Average, Finished Goods: 78.2%

Unweighted Average, Raw Materials: 21.8%

Such goods will be stored under contract with the manufacturer, the distributor or the retailer. The warehouse will distribute such goods to stores, factories, and various other receivers in the territory surrounding the warehouse. In performing its function as a merchandise warehouse, it provides such services as break-bulk, consolidation, distribution of pool cars, cartage, packaging, repairing, sampling, weighing, provides export and import services, such as U. S. Custom Bonded Storage and numerous other functions related to the storage and distribution of commercial goods.

5. The warehouseman's lien is essential to the business of a merchandise warehouse. The warehouse is generally a small business when compared with the large, national corporations for which it stores merchandise. The 1967 U.S. Department of Commerce, Bureau of the Census, Census of Business, Public Warehousing, BC67-WS9, notes that there were 1,677 general warehouses in the United States. (This is the latest Census of

Business report on warehousing). Of these 1,677 general warehouses, only 27 had 100 or more employees (Table 2). Only 200 of the 1,677 general warehouses earned annual gross revenues of $500,000.00 or more (Table 3). Most of AWA's members are privately-owned companies which are actively managed by the owner who lives in the community where the warehouse is located. Many of the warehouses are located in smaller metropolitan areas. Of the 1,677 in the 1967 study, a total of 954 were located in areas with less than 1,000,000 in population (Table 13). Merchandise warehousing businesses with few exceptions, are locally-owned and locally-based small business companies who store the merchandise of major companies who are located throughout the United States and the world. The lien of the merchandise warehouseman upon the goods stored is essential if he is to deal with such giant companies and their vast resources.

6. The merchandise warehouseman also deals with companies whose credit and reputation is unknown. These companies are located throughout the country and in foreign countries. The local warehouseman could not possibly check the credit standing and reliability of all of these customers. In dealing with manufacturers located at distant points, it must rely upon its lien.

7. Merchandise warehouses are used by manufacturers to permit them to expand into new markets. This is especially true of small, new companies who must gradually introduce their products into new markets. The lien allows the marketing of these products without the pre-payment of all distribution charges. It is in this manner that small producers are able to market in competition with large companies with established distribution systems. The warehousemen's lien protects the warehouseman when these new products or their producers fail. In some of these instances the depositors have completely disappeared and efforts to locate them have failed. In others

they go bankrupt and the warehouseman's lien is a recognized preference which protection is essential in terms of the credit risks of dealing with companies at distant locations.

8. In using the merchandise warehouse as a distribution point, manufacturers maintain a steady flow of goods moving through the warehouse. The warehousemen's lien allows the warehouseman to perform essential services for the goods and to release them prior to payment for such services since the lien is attaching to new goods of the customer that are entering the warehouse. To require the merchandise warehouse to deal with each lot of goods as a separate, distinct unit would either cause an unreasonable risk to be placed upon the warehouseman or it would force it into prepayment procedures that would diminish its value as a distribution center. The existence of the warehousemen's lien facilitates the free flow of goods through the warehouse.

9. Warehousemen not only furnish the numerous services which I previously mentioned, but they also expend their own funds on behalf of their customers. For example, they prepay freight charges for their customers or accept and pay for collect shipments. The lien protects them when they make such payments and the commercial value of such arrangements is important. In a modern economy, it is essential that goods move freely and quickly. Market prices fluctuate constantly and delays can cause serious problems in the buying and selling of goods. Retailers and manufacturers maintain minimum inventories, relying upon a pipeline of goods moving through the warehouse. The warehousemen's lien facilitates the free and easy movement of goods in commerce.

10. If the lien were held unconstitutional for merchandise warehouses, there would be increased costs and unnecessary delay in the movement of the goods. The increased costs would be charged to the bailee and ultimately increase the price of goods.

Affidavit of Donald E. Horton in Opposition to Summary Judgment

11. I have read the preliminary statement contained in the Plaintiffs' Memorandum of Points and Authorities in Support of Motions for Class Action Determination and Summary Judgment and the supporting affidavits of Shirley Herriott Brooks and Gloria Jones. In my entire career in the merchandise warehousing industry, I have never known of a single instance involving a merchandise warehouseman and depositor that even closely resembles the alleged factual circumstances in this case.

Indeed, the climate at the time of deposit of goods in a merchandise warehouse is completely foreign to the climate and circumstances alleged in this case. When goods are deposited in a merchandise warehouse by a manufacturing, distributing, or retailing firm, the deposit is invariably the result of prearrangement, negotiation of terms and charges, and a contractual understanding between depositor and warehouseman. In the event of a continuing business relationship, any changes in terms or charges are similarly the result of negotiation and contractual understanding.

s/ Donald E. Horton
DONALD E. HORTON

Sworn to October 3, 1974

AFFIDAVIT OF ARNOLD H. SHAW IN OPPOSITION TO SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Affidavit of Arnold H. Shaw in Opposition to Summary Judgment

ARNOLD H. SHAW, being duly sworn, deposes and says:

I am counsel to the Warehousemen's Association of the Port of New York, Inc., and the Cold Storage Warehousemen's Association of the Port of New York, Inc., defendant-intervenors, and I am a member of the bar of the within Court.

I submit this affidavit on behalf of the above mentioned defendant-intervenors in opposition to plaintiffs' motion for summary judgment.

I have been associated with the commercial public warehouse industry since March of 1946, not only as counsel to the Warehousemen's Association of the Port of New York, Inc., but as counsel to many individual commercial warehouse proprietors. My involvement with the industry has not only been of long duration, but it has been of an in-depth nature. I am, therefore, personally knowledgeable as to the facts hereinafter stated.

PRELIMINARY STATEMENT

The principal relief sought by plaintiffs is a judicial declaration of unconstitutionality of two sections of the Uniform Commercial Code, Sections 7-209 and 7-210. Section 7-209 provides for a warehouseman's lien, and Section 7-210 sets forth the method of enforcement of the lien. The predicate for the relief sought by plaintiffs is that under the unique circumstances spelled out in the pleadings and in plaintiffs' supportive affidavits, their constitutional rights were violated by the assertion on the part of the defendant, Flagg Brothers, Inc. of its rights under the U.C.C. warehouseman's lien sections, *supra.* However, plaintiffs are not content with an adjudication of their rights; they go considerably further and demand that the Court declare these U.C.C. lien sections unconstitutional.

In view of the broad and sweeping nature of the relief demanded by plaintiffs herein, this Court granted leave to the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York, as well as to the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. to intervene as defendants. The Court also granted leave to the Attorney General of the State of New York to intervene as a defendant upon the ground that the constitutionality of a State legislative enactment was under attack.

The Warehousemen's Association of the Port of New York, Inc. is a not-for-profit corporation of the State of New York. Its membership consists of a large number of commercial public warehousemen doing business in the City of New York and in the metropolitan New Jersey area. These members are in the business of storing, handling and distributing merchandise, commodities and materials of every conceivable character and description. Their establishments are frequently referred to as "dry" warehouses as distinguished from "cold storage" warehouses.

The Cold Storage Warehousemen's Association of the Port of New York, Inc. is an unincorporated association whose members do business in the same territory, but their activities consist primarily of the storage, handling and distribution of perishable foods and other commodities that require refrigerated facilities for their preservation and storage. Their establishments are frequently referred to as "cold storage" warehouses.

Both of the aforesaid defendant-intervenors store, handle and distribute goods, wares, merchandise, materials and commodities almost exclusively for and on behalf of merchants and other commercial and business establishments engaged in inter-state and international commerce. Their members are,

accordingly, a vital adjunct to the normal flow and functioning of business and commerce in the metropolitan New York and New Jersey areas. For example, many of the customers (bailors) of the said defendant-intervenors, are importers who store their goods in United States customs bonded facilities maintained by many of them in accordance with the Customs Revenue Laws and Regulations of the United States. These customs bonded warehouses are an indispensable facility for the great importing industry that is so vital to the commerce of the Port of New York. Importers, save for duty-free commodities, such as coffee, as a rule, place their dutiable property in customs bonded warehouses and thereby avoid the financial hardship of immediately liquidating duties on entry. The importers, in this way, may postpone the payment of duties until they are ready either to introduce their imported products into the domestic territory, or re-export them — in which latter event the payment of duties is avoided altogether. Imports are normally and almost routinely placed in various warehouses belonging to the network of customs bonded warehouses (both dry and cold) usually by customs brokers, and the bonded warehouses, also as a matter of normal routine, accept these imported goods for storage in reliance upon the protection of their warehouseman's lien without which, this flow of international commerce would be so substantially impeded as to effectively put many small or medium-sized importers out of business. It is, therefore, in my judgment scarcely an exaggeration to say that the import industry in the Port of New York might well be destroyed if the warehouseman's lien were to be judicially nullified.

The said defendant-intervenors function on a regional or local level in much the same way as the defendant-intervenors American Warehousemen's Association and International Association of Refrigerated Warehouses, Inc. function on a national level.

For convenient identification, the type of public warehouses represented by the Warehousemen's Association of the Port of New York, Inc. and the Cold Storage Warehousemen's Association of the Port of New York, Inc., and their national counterparts, the American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc. will hereinafter be referred to as "commercial warehouses". The principal defendant herein, Flagg Brothers, Inc., although, presumably, a public warehouse, is upon information and belief, not a commercial warehouse. Flagg is in the business of conducting what is commonly referred to as a moving and storage business, the thrust of which is to transport and place in dead storage non-commercial articles of personal property consisting mainly of used furniture and household furnishings belonging to the consuming or general public. For purposes of convenient identification, the type of establishments typified by the defendant, Flagg, will hereinafter be referred to as "furniture warehouses".

I

THERE IS A SUBSTANTIAL DISTINCTION BETWEEN COMMERCIAL WAREHOUSES AND FURNITURE WAREHOUSES.

The distinction between commercial warehouses and furniture warehouses relate not merely to the nature and type of property that may be stored and handled, but to the modus operandi of each.

As previously mentioned, commercial warehouses store and handle every conceivable type of merchandise and commodities, both raw materials and manufactured articles. Moreover, commercial warehouses deal not with the general or consuming public, but with the world of business, i.e., manufacturers,

distributors, retailers, importers, exporters, commodity exchanges and banking or financial institutions. With regard to the last mentioned category, storage of commercial goods in commercial warehouses is a common and frequent instrumentality for business finance in that warehouse receipts are used by the bailors as collateral security for business loans. Furniture warehouses, on the other hand, deal primarily with the general or the consuming public rather than with business and industry.

In the commercial warehouse sphere, storage per se is only one facet of the business. Distribution, filling orders (e.g., handling mail order activities), maintaining inventories, inventory controls, and even processing, are part and parcel of the commercial warehouse industry. In the furniture warehouse, typically, the furniture or other household furnishings are placed in what is known as dead storage for safekeeping with little handling activity involved save for the deposit of the goods initially and the withdrawal of the goods upon the expiration of the term of storage.

The most significant distinction, however, between storage in commercial warehouses and the type of furniture warehouse storage involved in the case at Bar, lies in the manner in which the relationship comes into being in each situation. In the case at Bar, there is a sharp issue on this very question. The defendant, Flagg, contends that the storage of plaintiffs' goods came about with the knowledge and consent of the plaintiffs. The claim, however, of the plaintiffs is that the storage of the goods and the rates charged therefor were unilaterally imposed upon plaintiffs and, therefore, it could not be said that a bailment contract was voluntarily entered into between these parties. This type of a relationship is unheard of in the commercial warehouse industry. The invariable practice and procedure is for the owner of the goods or the authorized agent of the owner of the goods to

deposit the same in the warehouse and otherwise to enter into the contractual relationship of bailment, so that what emerges is a true bilateral contract of bailment.

That there is a substantial distinction between the two types of warehousing is manifest in one of the very sections here under attack, namely, Section 7-210 of the U.C.C. which deals with the enforcement of the warehouseman's lien. This section has two main sub-divisions, sub-division (1) which provides for a public or private sale; and sub-division (2) which provides for a public sale. Sub-division (2) states that: "A warehouseman's lien on goods *other than goods stored by a merchant in the course of his business* may be enforced only as follows: * * *". (underscoring added).

II

IN VIEW OF THE SUBSTANTIAL DIFFERENCES BETWEEN COMMERCIAL WAREHOUSING AND FURNITURE WAREHOUSING, IT WOULD BE INAPPROPRIATE FOR THE COURT TO DECLARE THAT SECTIONS 209 and 210 OF THE U.C.C. ARE UNCONSTITUTIONAL BASED UPON THE FACTS INVOLVED IN THE RELATIONSHIPS BETWEEN THE PLAINTIFFS AND THE DEFENDANT, FLAGG.

At the very most, if the Court should be persuaded that plaintiffs' rights have been impaired, the Court might be justified in holding not that Sections 7-209 and 7-210, U.C.C. are unconstitutional, but that plaintiffs were denied their due process. However, plaintiffs are not, or at least do not seem to be satisfied with such an adjudication, or, for that matter, with any adjudication that would afford them a complete and adequate remedy. They insist upon creating a cause celebre by having the Court go the whole way and declare the statute

unconstitutional on its face in utter disregard of the farreaching, dire consequences mentioned below.

It goes without saying that the constitutional issues herein presented should not be weighed in a vacuum. The practical consequences of acceding to the extravagant demands of the plaintiffs are relevant for if Section 7-209 and 7-210 of the U.C.C. are declared unconstitutional as demanded by plaintiffs, the consequences not only to the commercial public warehouses, but to the whole of national and international trade and commerce would be devastating. The Court, is, therefore, respectfully cautioned to take heed of these possible consequences. It is reasonable to anticipate that the free flow of goods in commerce would be impeded. From time immemorial, public warehousemen's dependence upon the security of the warehouseman's lien has been the sine qua non of their operations. They readily take into their establishments for storage goods of every description from all types of bailors. Without the lien, commercial warehousemen would, of necessity, be required to be selective and to limit their receipt of goods only to those merchants, entrepreneurs and other persons who either belong to the financially elite, or to those who would be in a position to produce a surety bond or other acceptable guarantee of payment. It is, therefore, not difficult to envision the magnitude of the curtailment and destruction of trade, commerce and industry if the lien were nullified, bearing in mind the extent to which commercial activities depend upon the facilities of commercial warehousemen.

The drastic and extravagant remedy of a declaration of constitutional invalidity is neither necessary nor even essential to the protection of plaintiffs' rights, and great care should be taken by the Court to limit the application of any judicial declaration to the facts and circumstances of the case at Bar and not to Sections 7-209 and 7-210, of the U.C.C., on their face.

III

PLAINTIFF HAS FAILED TO STATE A FEDERAL CAUSE OF ACTION AND THIS COURT IS, ACCORDINGLY, WITHOUT JURISDICTION.

The statutory warrant for this action is 42 U.S.C. Section 1983. However, in order than an action under this Section may be sustained, a showing that action by the State of New York is involved is mandatory. Plaintiffs have failed in such a showing.

Plaintiffs' argument that the imposition and execution of the warehouseman's lien constitutes State action so as to give this Court jurisdiction is inconsistent with the recognition throughout plaintiffs' brief that the warehouseman's lien, as such, existed under common law. Under these circumstances, the claim that Section 7-209 of the U.C.C. which in essence declares that the warehouseman has a lien is really not under attack. Actually, the only section that the plaintiffs are attacking is Section 7-210 which deals with the enforcement of the warehouseman's lien and which, according to the plaintiffs, involves State action. To support this argument, plaintiffs have urged that in enforcing their lien, warehousemen perform functions that are ordinarily performed by public officials, such as a sheriff. It is quite clear that the warehouseman's lien type situation is a great deal closer to those which the various decisions cited have found that State action is not involved because there is no delegation of the traditional State power granted to any person or to any official. It is almost absurd to predicate a claim that State action is involved on the ground that a largely substantive State statute is also involved. Further, not only the lien, but the method of enforcement of the lien are not dependent upon statute. It has previously been pointed out that plaintiffs concede that the lien existed under common law.

In addition, the right to enforce the lien is not wholly dependent upon the statute, but may be predicated upon a contract between the bailor and the bailee. There is nothing governmental or public about the lien or its enforcement. It is essentially a private transaction and a private activity in which the State plays no role whatsoever procedurally. The only involvement of the State is in its purely legislative function in having enacted a statute that prescribes a substantive right and a means of enforcing that right which *could* be created by contract even in the absence of the statute. There are no State regulations; there are no administrative agencies involved; there are no public officials who are clothed with authority to take action. As already stated, what we have here is a strictly private-type transaction that existed under common law and that can be created by contract. Under these circumstances, State action is not involved and an essential element of this Court's jurisdiction is, therefore, lacking.

IV

THERE ARE TRIABLE ISSUES OF FACT PRESENTED WHICH SHOULD BE SUBMITTED FOR DETERMINATION IN A STATE FORUM. SUMMARY JUDGMENT IN A FEDERAL COURT IS SINGULARLY INAPPROPRIATE.

Plaintiffs claim that they were involuntarily hoodwinked into going along with the warehousing of their property. Defendant, Flagg, claims that the warehousing relationship came into being with the knowledge and consent of the plaintiffs and the result was a bilateral bailment contract. This is the principal issue presented, the resolution of which involves a determination of credibility and all of the other factors that can be deduced only from the kind of evidence presented at a trial in a State court, and not from the summary statements imparted

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by affidavit and memoranda in a motion for summary judgment in a Federal Court.

To repeat, the rights and corresponding obligations as between these principal parties can, and indeed should be determined by individual suits in State courts of appropriate jurisdiction. All appropriate remedies are readily available thereby.

V

CLASS ACTION STATUS IS NOT INDICATED.

Class action status is neither warranted nor justified. The substantial differences between commercial warehouses and furniture warehouses, as above delineated, and the unique circumstances surrounding the transactions between plaintiffs and the defendant, Flagg, strongly militate against class action treatment. Class action status, *if any*, should be confined to the type of establishment represented by the defendant, Flagg, as well as the aforesaid unique circumstances, *i.e.*, removal of furniture and household furnishings by a City marshal or similar officer pursuant to a judgment of a State court, and the placing of such goods in a public warehouse. Similar circumstances, to the best of my knowledge, never arise in the commercial warehousing industry.

It is respectfully submitted that the within motion be denied, and that the complaints herein be dismissed.

s/ Arnold H. Shaw
ARNOLD H. SHAW

(Sworn to October 16, 1974)

DISTRICT COURT OPINION AND ORDER #42742 DISMISSING COMPLAINT, 404 F.SUPP. 1059 (S.D.N.Y. 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants.

73 Civ. 4050 (HFW)

HENRY F. WERKER, D.J.

Plaintiffs Brooks and Jones are residents of Westchester County whose property was stored by defendant Flagg Brothers, Inc. following their evictions by the Mount Vernon Marshal in 1973.[1] On their own behalf and that of a proposed class of "persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code § 209 and subject to sale pursuant to New York Uniform Commercial Code § 210 because of warehouse fees allegedly due,"[2] they

challenge the constitutionality of those two statutes pursuant to 42 U.S.C. § 1983.[3] They allege deprivation of due process guaranteed by the Fourteenth Amendment of the United States Constitution, and seek declaratory and injunctive relief as well as money damages. Their proposed class of defendants includes "all . . . warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§ 209-210 without affording the owner of the goods a prior opportunity to be heard."[4]

Section 7-209 grants a warehousemen a lien on goods stored, and/or transported, for fees allegedly owed by the customer.[5] Section 7-210 gives a warehouseman the authority to enforce such a lien by public or private sale upon proper notification to the customer and adherence to commercially reasonable sale procedures.[6]

Plaintiffs have moved for class action certification of both a plaintiff and a defendant class, and for summary judgment on the question of the statutes' constitutionality. Defendants have cross-moved to dismiss for failure to state a cause of action and for lack of subject matter jurisdiction on the ground that the challenged conduct does not constitute state action within the meaning of the Fourteenth Amendment, and was not performed "under color of" state law within the meaning of § 1983.[7] Upon careful consideration of the facts in this case and the following analysis of relevant Second Circuit and Supreme Court decisions, the court finds that defendants are indeed correct. Plaintiffs' action is consequently dismissed for lack of jurisdiction.

Plaintiffs have advanced four arguments in support of their assertion that state action is present in the challenged activity. Their first argument is that the Second Circuit's decision in *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973) compels a finding of state action in this case. State

action, however, was never discussed in that opinion. In *Hernandez* plaintiff challenged the garageman's lien provisions of the New York Lien Law which allow a garageman to detain an automobile until alleged storage and repair charges are paid, and to foreclose his lien by selling the auto upon proper notification to the bailor.[8] The district court judge dismissed the complaint, noting:

> "[E]ven assuming that the defendants are acting under color of state law, the court cannot find that the plaintiffs' constitutional right to due process of law has been deprived by the operation of the challenged provisions of the lien law. Consequently, . . . the court need not go further and formally pass upon the second requirement — the presence of state action."

346 F. Supp. 313, 317 (E.D.N.Y. 1972).[9] On appeal the Second Circuit upheld the dismissal as to the detention provisions of the New York Lien Law because it found that having voluntarily delivered his car to the defendant garageman, and having never requested its return or tendered reasonable storage charges, the plaintiff had no standing to challenge the lien. 487 F.2d at 380. As to the sale provisions of the statute, however, the court noted that if, upon remand, the district judge were to find plaintiff's version of the facts as alleged,

> "then we would conclude that plaintiff has, under the doctrines enunciated in *Fuentes v. Shevin*, 407 U.S. 67 (1972), *Bell v. Burson*, 402 U.S. 535 (1971), and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, a tenable contention that Section 204 of the New York Lien Law as applied here was repugnant to the due process clause of the Fourteenth Amendment. . . ."

Id. at 380-81. Neither the court's opinion nor the concurring opinion[10] in *Hernandez* mentioned or discussed the issue of state action.

Plaintiffs argue that a "finding" of state action is implicit in both *Hernandez* opinions. However, because District Judge Costantino had merely assumed the presence of state action in order to consider and dismiss the Hernandez constitutional claim on its merits, the state action issue was not properly before the Court of Appeals; the sole issue on appeal was whether, assuming state action, plaintiff had stated a claim. Furthermore, even if a finding of state action were implicit in the Second Circuit's decision, this court would not be bound by such a *sub silentio* ruling. *United States v. L.A. Tucker Truck Lines,* 344 U.S. 33, 38 (1952). This court therefore concludes that the Second Circuit's decision in *Hernandez* is not dispositive of the state action issue in this case.

Plaintiffs, in their remaining argument, would have the court find state action because:

> - the warehouseman who enforces his own lien pursuant to § 7-210 is performing what has traditionally been a public function;
>
> - the state imposes extensive regulation on the warehousing industry, including regulation of the challenged activity; and
>
> - section 7-210 confers on warehousemen rights in excess of those at common law.

The question of whether state action exists usually arises with respect to private conduct upon an allegation that the conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become suject

to the . . . limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 (1966). However, as the Supreme Court noted in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 172 (1972), "while the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other hand, frequently admits of no easy answer." The answers, particularly in recent months, have varied from circuit to circuit, and even within the Second Circuit have produced division and disagreement among panels.[11]

In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975), Judge Smith enumerated five factors culled from a review of state action case law which the court found to be "particularly important to a determination of state action":[12]

> (1) the degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme;(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition a' a 'private' organization in associational or other constitutional terms.
>
> Each of these factors is material; *no one factor is conclusive.*

* * *

> Moreover, even if one of these factors is absent, a finding of state action may still be appropriate.

Id. at 629-34 (emphasis added). Plaintiffs' second argument for state action, that in enforcing his own lien a warehouseman is performing a public function, finds support in Judge Smith's list above. Their rationale is that at common law a warehouseman could enforce his lien only by obtaining a court judgment and having the sheriff execute on it; thus, by allowing a warehouseman to enforce his lien without resort to the courts and the sheriff, § 7-210 enables him to perform an "inherently" public function. Plaintiffs rely for this theory upon *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 20 (1973) in which the New York Court of Appeals found that an innkeeper's execution of his own lien amounts to the exercise of a public function: "[T]he execution of a lien, be it conventional security interest, (cite), a writ of attachment (cite), or a judgment lien (cite), traditionally has been the function of the Sheriff."

The liens referred to by the Blye court, however, all involve satisfaction of a debt having no particular relation to the goods executed upon. While such liens historically belong to the sheriff for execution, execution on goods lawfully in a warehouseman's possession, to satisfy charges *arising out of such possession,* is not traditionally a function of the sheriff; traditionally the sheriff was called upon for execution on goods only after the warehouseman had obtained a judgment lien.[13] *Melara v. Kennedy,* 74 Civ. 1535, N.D. Cal., August 21, 1974. *Accord,* Collier, Procedural Due Process — Post Fuentes Constitutionality of Garageman's Liens, 54 B.U.L. Rev. 542, 554 (1974). This distinction mandates rejection of the public function theory.[14] *Cf. James v. Pinnex,* 495 F.2d 206, 208 (5th Cir. 1974); *Melara v. Kennedy, supra.* In *Melara,* a case substantially identical to the one at hand, the court held that enforcement of a lien pursuant to § 7210 of the California Uniform Commercial Code was not performance of a state or public function, and did

not constitute state action. *See also Parks v. Ford,* 72 Civ. 639, 73 Civ. 1699, E.D. Pa., December 11, 1974. (Pennsylvania's repairman's lien statutes do not so infuse private acts of detention and sale with state involvement as to render them state action).

Plaintiffs' third argument in support of state action relies upon the public function theory and must be rejected with it. They suggest that because "warehouses and warehousemen are affected with a public interest," state regulation of the industry permeates its nominally private acts with state action. This line of reasoning was effectively foreclosed by the Supreme Court in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). In that case petitioner challenged the constitutionality of the defendant's authority, under a tariff filed with the State Public Utilities Commission, to cut off her electric power without meeting the due process standards enumerated in *Fuentes v. Shevin,* 407 U.S. 67 (1972). Justice Rehnquist, writing for the Court, stated:

> Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses 'affected with the public interest' are state actions in all their actions.
>
> We decline the invitation for reasons stated long ago in *Nebbia v. New York,* 291 U.S. 502 (1934), . . . :
>
> > It is clear that there is no closed case or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature

> of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . . In several of the decisions of this Court wherein the expressions 'affected with a public interest' and 'clothed with a public use' have been put forward as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test.' *Id.*, at 536.

Id. at 353.

Plaintiffs seem to have anticipated such foreclosure, for they suggest in the alternative that even if the challenged activity is essentially private, state regulation of the industry is so directly and significantly involved therein that the state must be viewed as a joint participant. Under this rubric which tracks factor (2) in Judge Smith's list above, the state's "involvement" is its regulation of the warehouseman's lien sale and its failure to include in that pervasive regulation a requirement of *Fuentes* due process standards. This in essence is the theory first used by the Supreme Court in *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).[15] *Burton,* however, is distinguishable in two important ways. First, in the instant case the symbiotic relationship between the state and the private defendant present in *Burton* is missing. Secondly, *Burton* was a case involving racial discrimination, and "racial discrimination is so peculiarly offensive and . . . so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." *Coleman v. Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970).[16] *See also Greco v. Orange Memorial Hospital Corp.,* 43 U.S.L.W. 2522-23 (5th Cir. 1975); *Adams v. So. Cal. First National Bank,* 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied,* 43 U.S.L.W. 3277 (1974). Thus resolution of the state action

issue in this, a non-racial case, is not controlled by the standards evolved in cases of racial discrimination.

Plaintiff's last argument, and by all appearances the sturdiest, is that by statutorily conferring on warehousemen a power not possessed at common law, the state has created an impetus for warehouseman lien sales, has encouraged such sales, and has thereby so involved itself in the challenged conduct as to transform it into state action.[17] (See factor (3) of Judge Smith's *Jackson v. Statler Foundation* list, *supra.*) The key to this argument is the alteration of common law, for the Second Circuit in recent decisions has held mere statutory codification of common law rights insufficient state involvement to constitute state action. *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974); *Shirley v. State National Bank,* 493 F.2d 739 (2d Cir. 1974). In *Shirley,* where plaintiff challenged repossession of goods purchased under an installment sales contract, the court stated:

> . . . since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action.

Id. at 743. Likewise, in *Bond,* the court found that state action was not present in an assignment of wages made pursuant to New York's wage assignment statute because "the statute has not given the assignee anything new." *Id.* at 311. *See also Phillips v. Money,* 503 F.2d 990 (7th Cir. 1974); *Fletcher v. Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir. 1974); *Parks v. Ford, supra* at 30-31; *Boland v. Essex County Bank and Trust Co.,*[18] 361 F. Supp. 917 (D. Mass. 1973).

The question remains whether satisfaction of this "common law codification or alteration" test alone constitutes state involvement significant enough to be called state action. Judge Smith in *Jackson v. Statler Foundation, supra,* warned that "no

one factor is conclusive." By definition, if the facts here do not meet the state action standards for cases of racial discrimination such as *Statler Foundation*, they do not meet the more exigent prerequisites to state action in non-racial cases. The Fifth and Ninth circuits, in the context of challenges to self-help repossession statutes, have both found the common law test, alone, to be insufficient. In *Adams v. So. Cal. First National Bank*, *supra*, the Ninth Circuit stated:

> [W]e do not consider it conclusive that section 9503 of the California Commercial Code confirmed what the law of California had theretofore been, *i.e.*, that a secured party upon default had a right to take possession of the collateral. This is not the final answer to the touchstone of state action. Were such a test the only one, the California statutes adopting the common law of England would cast the shadow of state action over all activity and pose an argument that could blanket all individual wrongs under section 1983.

492 F.2d at 330. The Fifth Circuit in *James Pinnex*, *supra*, noted:

> . . . the fact is that Mississippi cases did not sanction self-help repossession except when provided for in the parties' contract, whereas § 9-503 allows it except when the contract is silent on the point. Thus the creditor's arguments that § 9-503 merely carried forward the former Mississippi practice and that the contract is the sole source of summary repossession power, lose some force.

495 F.2d at 498. The court then went on to conclude, however, "No bright lines can be drawn in this area, and we draw none. Some state involvement . . . may be present here, but it is simply not enough, given the nonracial nature of the case, to constitute state action."

Given the Second Circuit's discussions in *Shirley* and *Bond*, as well as relevant decisions from other courts, it seems clear to this court that with respect to those members of plaintiffs' "class" whose contracts contained a sale-in-case-of-default provision, there is no state action. See note 17 *supra*. As the Ninth Circuit noted in *Adams*, "the State cannot be held responsible for creating conditions that result in standardized contracts in the credit industry which typically provide for self-help repossession without notice or an opportunity for a hearing prior to the seizure of property." 492 F.2d at 333. See Note — State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L. Rev. 656 at 665 (1974). Indeed, one case which has dealt specifically with § 7-210 and a contractual provision for sale has so ruled. *Smith v. Bekins Moving and Storage Co.*, 384 F. Supp. 1261 (E.D. Pa. 1974). Furthermore, here as in *Shirley* and *Bond*, the codification and alteration of common law also impose certain procedural restraints on it, to the benefit of warehouse customers, *i.e.*, requirements as to fair notice, reasonable sale, etc., and thus, as in those cases, represent ameliatory rather than regressive action. "Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like." *Jackson v. Statler Foundation*, *supra* at 639.

Likewise, with respect to those in plaintiffs' "class" who are subject to no contractual provision of sale, the court also fails to find sufficient state involvement to constitute state action. It is true that for this group of warehouse customers the defendants' power of sale comes only from § 7-210. However, in its decision in *Jackson v. Metropolitan Edison Co.*, *supra*, the Supreme

Court stated: "Approval by a state utility commission . . . , where the Commission has not put its own weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'" *Id.* at 357 (emphasis added). In this case no less than in Jackson, the state's involvement in the challenged activity is merely permissive. For this reason, and for the reasons detailed above, the court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court under 28 U.S.C. § 1343(3), or to state a claim under 42 U.S.C. § 1983. The action is therefore dismissed.

SO ORDERED.

Dated: New York, New York

July 7, 1975

_____

U. S. D. J.

NOTES

1. For the allegations of these named plaintiffs see the decision on Jones' motion to intervene by the Honorable Murray Gurfein, then U.S.D.J., at 63 F.R.D. 409, 411-12 (S.D.N.Y. 1974).

2. Verified Complaint at 2.

3. Section 1983 reads:

   > Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

   Federal district courts have jurisdiction to hear actions under § 1983 by virtue of 28 U.S.C. § 1343 (3).

4. Verified Complaint at 3.

5. Prior to codification by the U.C.C. and its predecessors, such a lien existed at common law. R. Brown, The Law of Personal Property § 119 (2d ed. 1955).

6. Such a right of enforcement did not exist in New York at common law, although it has existed in statutory form since 1879. See note 17, *infra.*

7. The "state action" and "action under color of state law" concepts have been found to be functionally equivalent. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970). Hereinafter they shall be jointly referred to as "state action."

8. The statutes challenged in *Hernandez* are substantially similar to those in question here. *Compare,* New York Lien Law §§ 184, 201, 202 and 204 with New York U.C.C. §§ 7-209, and 210.

9. In a footnote, however, Judge Costantino noted that the presence of state action "would seem to be quite manifest." "Though he is a private individual, the lienor through the public auctioneer it has retained, is performing a traditionally public function pursuant to a right accorded it by a state statute." 346 F. Supp. 313 at 317.

10. Judges Timbers and Lumbard, in a concurring opinion, went further than Judge Wyzanski in the court's opinion, stating that they would direct the district court to declare the sale provisions unconstitutional as applied if plaintiff were to prove his allegations.

11. In *Tucker v. Maher,* 497 F. 2d 1309 (2d Cir. 1974) Judge Mulligan noted:

> Constitutional law, particularly in this difficult and confusing area of state action and due process, is hardly predictable with any degree of certainty. The very recent history of such constitutional litigation in this circuit should convincingly indicate that the role of the prophet is precarious at best.

In a footnote he then added:

> In *Shirley v. State Nat'l Bank,* 493 F.2d 739 (2d Cir. 1974), and *Bond v. Dentzer,* 494 F.2d 302 (2d Cir. 1974), after both panels had split 2-1 over state action issues, rehearings en banc were denied . . . by votes of 5-3. In *Jackson v. Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), again a state action case, a rehearing en banc was also denied by a failure of a majority of the active judges to vote in favor of such reconsideration; the vote was 4-4, 496 F.2d at 636.

Id. at 1315.

12. Although the *Jackson v. Statler Foundation* factors were enumerated in the context of an action against charitable foundations for alleged racial discrimination, and the courts have traditionally used a lesser state action standard where race is concerned (see page 9, *infra*), they are helpful in delimiting the outer boundaries of state action prerequisites. The court in *Statler Foundation* found that if the defendant institutions were substantially dependent upon their tax-exempt status, if the government's regulatory scheme was both detailed and intrusive, if the scheme carried connotations of government approval, if the institutions did not have a substantial constitutional claim to be left alone, and if they served some public function *then* the district court on remand could find state action.

13. Ever since its statutory creation in 1879 (L. 1879 c. 336), the warehouseman's lien has traditionally been enforced by warehousemen themselves.

14. Even if this court were to conclude, however, that enforcement of a lien pursuant to § 7-210 constitutes execution of a public function, this conclusion would not lead inexorably to a finding of state action. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 353 (1974); *Powe v. Miles,* 407 F.2d 73, 80 (2d Cir. 1968).

15. In *Jackson v. Metropolitan Edison Co., supra,* the Supreme Court described the Burton case as follows:

> . . . where a private lessee who practiced racial discrimination leased space for a restaurant from a state parking authority in a publicly owned building the Court held that the State had so far insinuated

itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.* at 725. We cautioned, however, that 'while a multitude of relationships might appear to some to fall within the Amendment's embrace,' differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. 419 U.S. at 357-58.

16. Our circuit has long recognized a double 'state action' standard, a less onerous test for cases involving racial discrimination, and a more riguous standard for other claims. *See United States v. Wiseman,* 445 F.2d 792, 795 at n.3 (2d Cir. 1971).

17. The statutory right to enforce the warehouseman's lien, first enacted in 1879, was reenacted as § 118 of the New York General Business Law in 1907. L. 1907, c. 732 § 33, as amended L. 1949, c. 588. In 1962 the state legislature again reenacted it, this time as part of the U.C.C., effective since 1964. The state courts have traditionally considered these statutory provisions to be in derogation of common law. *See, e.g.: Maritime World Corp. v. Grefe Steel Warehouse Corp.,* 154 N.Y.S. 2d 684 (S. Ct. N.Y. Cnty 1956); *Hackett v. Nelson Express & Storage Co.,* 294 N.Y.S. 905 (S. Ct. N.Y. Cnty 1937). To the extent, however, that contractual provisions between warehousemen and customers allowing for sale in case of default have been enforced by the courts, sale provisions of contractual origin can be said to be part of the state's common law. *Cf.* note 18, *infra.* A majority of warehouseman contracts in New York apparently contain such provisions.

18. In *Boland,* the court examined the constitutional validity of the Massachusetts self-help repossession statute. It found that at common law repossession was allowed *only if* *provided* for by contract, whereas the statute in question allowed repossession *unless* it was *prohibited* by contract. In dicta the court asserted that the same differences had existed in *Shirley v. State National Bank, supra,* between the common and statutory law of Connecticut, adding: ". . . there is no indication in the [Second Circuit] court's ruling in *Shirley v. State National Bank* that the parties undertook to demonstrate to the court the changes in the law of Connecticut brought about by its enactment of the U.C.C." *Id.* at 921. The *Boland* court found that state action existed.

19. The court notes that a challenge to §§ 7-209 and 7-210 has already been mounted in the state courts. In *Jones v. Banner Moving and Storage Inc.,* 358 N.Y.S.2d 885 (Kings Cnty 1974), the New York Supreme Court found those statutes to be unconstitutional for essentially the same reasons plaintiffs would present here. That decision has been argued on appeal to the Appellate Division, 2d Dept., and is now *sub judice.*

MEMORANDUM ENDORSED ON PLAINTIFFS' AFFIDAVITS AND NOTICE OF MOTION FOR CLASS ACTION DETERMINATION AND FOR SUMMARY JUDGMENT

Motion denied.
Complaint dismissed.
See opinion #42742.

So ordered.

s/ Henry F. Werker
U.S.D.J.

MEMORANDUM ENDORSED ON DEFENDANT FLAGG BROTHERS, INC.'S AND HENRY FLAGG'S AFFIDAVITS AND NOTICE OF MOTION TO DISMISS COMPLAINT

Motion granted.
See opinion #42742.

So ordered.

s/ Henry F. Werker
U.S.D.J.

NOTICE OF APPEAL TO SECOND CIRCUIT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED]

NOTICE is hereby given that SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment and order of the United States District Court denying plaintiffs' motions for a class action determination and summary judgment, and granting defendants' motion to dismiss, and from the judgment and order dismissing the above entitled action, and from each and every part of said judgment and orders, entered in this action on the 7th day of July, 1975.

Dated: July 24, 1975
White Plains, New York

s/ Martin A. Schwartz
THE LEGAL AID SOCIETY
OF WESTCHESTER COUNTY

(Service list omitted)

COURT OF APPEALS OPINION REVERSING DISMISSAL AND REMANDING CAUSE, 553 F.2d 764 (SECOND CIRCUIT, APRIL 7, 1977)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 523—September Term, 1975.

(Argued February 13, 1976 Decided April 7, 1977.)

Docket No. 75-7437

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

Before:

TIMBERS, *Circuit Judge,* and
HOLDEN* and BRYAN,** *District Judges.*

* James S. Holden, Chief Judge of the District of Vermont, sitting by designation.

** Frederick vP. Bryan, Senior District Judge of the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York, Henry F. Werker, *J.*, dismissing, for lack of state action, plaintiff's complaint challenging §§7-209 and 7-210 of the New York Uniform Commercial Code as violative of 42 U.S.C. §1983 and the due process clause of the fourteenth amendment to the United States Constitution.

Reversed and remanded.

Martin A. Schwartz, Esq., White Plains, N.Y. (The Legal Aid Society of Westchester County, White Plains, N.Y., on the brief, Lawrence S. Kahn, Evelyn Isaac, of counsel), *for Plaintiffs-Appellants.*

Alvin Altman, Esq., New York, N.Y. (Brodsky, Linnett & Altman, New York, N.Y., on the brief, Michael Barnas, of counsel), *for Defendants-Appellees Flagg Brothers, Inc., and Henry Flagg.*

William H. Towle, Esq., Chicago, Ill. (Burke, Kerwin & Towle, Chicago, Ill. and Werner & Weiss, P.C., New York, N.Y., on the brief, Norman Weiss, of counsel), *for Defendants-Appellees American Warehousemen's Association and The International Association of Refrigerated Warehouses, Inc.*

Arnold H. Shaw, Esq., New York, N.Y. (Jaffe, Shaw & Rosenberg, New York, N.Y., on the brief), *for Defendants-Appellees Warehousemen's Association of New York and New Jersey, Inc., and the Cold Storage*

Warehousemen's Association of the Port of New York.

A. Seth Greenwald, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, State of New York, and Samuel A. Hirshowitz, First Asst. Attorney General, of counsel), *for Defendant-Appellee Louis J. Lefkowitz, Attorney General of the State of New York.*

Bryan, *Senior District Judge:*

New York Uniform Commercial Code §7-209 grants a warehouseman a lien upon goods in his possession for charges incurred in connection with storage, and permits him to retain the goods until such charges are satisfied. New York Uniform Commercial Code §7-210 gives the warehouseman the power to enforce his lien by selling the stored goods, after complying with specified procedures.[1]

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1 The full text of the statutes in question follows:

§ 7—209. Lien of Warehouseman

(1) A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no

This statute provides that notice of a prospective sale be given to the owner of the stored goods. It does not, however, contemplate any judicial determination of the amount owing prior to the sale of the goods in satisfaction of the warehouseman's charges.

The question presented by this appeal is whether the warehouseman's enforcement of his lien in this manner constitutes action "under color of" state law within the meaning of 42 U.S.C. §1983 or state action under the

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charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Article on Secured Transactions (Article 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under section 7—503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

§ 7—210. Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against

fourteenth amendment.[2] We hold that it does, and therefore reverse the lower court's dismissal of the complaint and remand for a determination of whether the statutory scheme involved comports with due process.

I.

Since the case comes before us on the dismissal of the complaint, we accept the plaintiffs' allegations of fact as true. *See Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957).

The original plaintiff in this case, Shirley Herriott Brooks, was a resident of Mount Vernon. On June 13, 1973, pursuant to an order of eviction of the City Court of Mount Vernon, the city marshal removed Brooks and her possessions from her apartment. Brooks told the marshal that she wanted to call someone to store her furniture and other household goods. The marshal informed her that she could not do so and that the man with him, defendant Henry Flagg, president of defendant Flagg

whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

2 The "under color of" state law provision in §1983 is equivalent to the state action requirement of the fourteenth amendment. *Shirley* v. *State National Bank of Connecticut,* 493 F.2d 739, 741 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974), citing *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 n.7 (1970) and *United States* v. *Price,* 383 U.S. 787, 794-95 n.7 (1966).

Brothers, Inc., would store her furniture. Flagg told Brooks that she would have to pay $65 per month for the moving and storage of her furniture. Brooks replied that this sounded like a high price but, believing that she had no choice, authorized Flagg to proceed with the moving and storage of her furniture and household possessions.

As soon as her goods were loaded on Flagg's trucks, one of the moving men told Brooks that she would have to pay $178—$75 per month for storage, $75 for barreling and platforming, and $28 for fumigating. Brooks protested that the entire job was only to cost $65, but eventually handed over a check for $178.

On or about June 15, 1973, Brooks called Flagg Brothers to find out how long it would store her goods for the $178 payment. She was informed that she already owed an additional $156. On June 19, 1973, Brooks went to the Flagg Brothers office. She was given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" indicating that Flagg Brothers regarded the $178 payment as a deposit and that there was a "balance due" of $156.[3] Brooks told Henry Flagg that the charges were unreasonable and that she could not pay them. He told her that on the first of July, 1973 she would owe an additional $75 for storage for the month of July. Brooks argued that her storage

3 We reject Flagg Brothers' assertion that Brooks agreed to sale upon default in payment by accepting, some six days after the initial storage, the "Combined Uniform Household Goods Bill of Lading and Freight Bill" which in minute print referred to sale by the warehouseman in the event of nonpayment of storage charges. *See Fuentes* v. *Shevin,* 407 U.S. 67, 94-96 (1972). We thus view the authorization of sale of stored goods by Flagg as arising solely from §7-210, specifically subsection (2) which governs enforcement of a warehouseman's lien on goods other than goods stored by a merchant in the course of his business, and not from any contractual provisions. This is undoubtedly the case with respect to plaintiff Jones, who alleges that she never authorized storage of her goods, *see infra* at 4. The court below adopted this analysis, at least in part.

payment on June 13, 1973 should run to July 13, 1973, but Flagg insisted that, since storage charges are computed on a "per month" basis, even if her goods had been stored on June 29, 1973 an additional $75 would still be due on July 1, 1973.

The dispute over storage charges continued. On August 25, 1973, Brooks received a letter from Flagg Brothers informing her that unless she paid her outstanding balance of $306 within 10 days, her furniture would go up for sale. This letter was accompanied by a "Final Notice" informing Brooks that, unless payment on her storage account were made, Flagg Brothers would advertise her goods for public auction.

On September 21, 1973, Brooks instituted this action on behalf of herself and a proposed class consisting of

> persons whose property is stored in a warehouse located in the State of New York and whose property has been encumbered by a lien pursuant to New York Uniform Commercial Code §7-209 and subject to sale pursuant to New York Uniform Commercial Code §7-210 because of warehouse fees allegedly due, without opportunity for a prior hearing.

Relying upon 42 U.S.C. §1983[4] and its jurisdictional counterpart, 28 U.S.C. §1343(3),[5] she sought injunctive and

4 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5 28 U.S.C. §1343 provides:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .

declaratory relief and damages on the ground that the detention and threatened sale of her goods pursuant to New York Uniform Commercial Code §§7-209 and 7-210 violated the due process clause of the fourteenth amendment. Named as defendants were the Mount Vernon marshal,[6] Henry Flagg, and Flagg Brothers, Inc., individually and as representative of a proposed defendant class consisting of

> warehousemen doing business in the State of New York and who impose liens and subject goods to sale pursuant to New York Uniform Commercial Code §§209-210 [sic] without affording the owner of the goods a prior opportunity to be heard.

In accordance with an agreement between counsel, on January 24, 1974, subsequent to the filing of the complaint, Brooks was permitted to remove her possessions from Flagg Brothers' warehouse without paying the disputed storage charges. Then in February, 1974 counsel stipulated that the action, with the classes described substantially as above, was a proper plaintiff and defendant class action under Fed. R. Civ. P. 23 with respect to the claims for injunctive and declaratory relief. These stipulations, however, were never approved by then District Judge Gurfein, to whom the case was assigned.

On June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as party plaintiff pursuant to Fed. R. Civ. P. 24. Jones' allegations were parallel to

> (3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

6 The action was subsequently dismissed as to the marshal by agreement of the parties.

those of Brooks. She, too, had been evicted by the Mount Vernon marshal, who was accompanied by an employee of Flagg Brothers. Jones denies, however, that she ever authorized Flagg Brothers to store her goods "either by written or oral contract, or otherwise," and claims that she was never advised of the rate she would have to pay for the storage of her household belongings. At the time of her proposed intervention, Jones' goods were still being retained by Flagg Brothers, who informed her counsel that they had no present intention to sell the goods and would inform him well in advance if they did decide to sell them.[7]

By the same order that granted Jones' motion to intervene, Judge Gurfein permitted the Attorney General of the State of New York, the American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc., the Warehousemen's Association of the Port

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7 It appears that after the district court rendered its decision of July 7, 1975 dismissing the complaint, *see infra* at 5, Mrs. Jones informed her counsel that she had paid Flagg $1,600 for the return of her goods; that she did not receive all of her goods back; that some of her goods were received in damaged condition; and that she did not make the $1,600 payment voluntarily but only because of alleged threats of sale and the twenty-month detention of the goods.

Thereafter, by letter dated December 15, 1976, while this appeal was *sub judice*, Jones' counsel informed the court pursuant to Fed. R. App. P. 43 that he had learned of her recent death.

It is well settled that a plaintiff's cause of action under 42 U.S.C. §1983 survives for the benefit of the estate if the applicable state law creates a right of survival. *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1974); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974); *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.), *cert. denied*, 368 U.S. 921 (1961). *See also Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977) (§1983 claim survives plaintiff's death after suit was brought even though it would abate under applicable state law). Jones' claims for relief would survive under New York Estates, Powers and Trusts Law §§11-3.1, 3.2(b), and thus are not abated by her death for purposes of this suit. Accordingly, counsel for Jones requests that, in the event of reversal, the case be remanded to the district court with leave for substitution of her personal representative pursuant to Fed. R. Civ. P. 25(a).

of New York, Inc.,[8] and the Cold Storage Warehousemen's Association of the Port of New York to intervene as parties defendant. *Brooks* v. *Flagg Brothers, Inc.*, 63 F.R.D. 409 (S.D.N.Y. 1974). The Attorney General was allowed to intervene on consent. Judge Gurfein permitted the trade associations to intervene over the objection of plaintiffs' counsel. The associations claimed that their members were engaged in large scale warehousing on behalf of merchants and other commercial entities functioning in interstate commerce, and argued that their interests in upholding the constitutionality of §§7-209 and 7-210 would not be adequately represented by Flagg Brothers, whose business was the moving and storage of furniture and other household goods.

On August 26, 1974, plaintiffs moved for class certification as to both plaintiffs and defendants, and for summary judgment on the question of the constitutionality of §§7-209 and 7-210. On September 19, 1974, the Flagg defendants moved to dismiss the action for failure to state a claim upon which relief can be granted.

By decision and order dated July 7, 1975, Judge Werker, to whom the case had been reassigned, denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint. Applying the analysis of *Jackson* v. *Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975),[9] Judge Werker concluded

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8 The Warehousemen's Association of the Port of New York, Inc., subsequently amended its certificate of incorporation to change its name to "Warehousemen's Association of New York and New Jersey, Inc."

9 In *Jackson*, Judge Smith specified five factors that are "particularly important" to a determination of state action:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to

that in imposing and enforcing his lien pursuant to §§7-209 and 7-210, the warehouseman does not act "under color of" state law within the meaning of 42 U.S.C. §1983. He dismissed the action for failure to state a claim under 42 U.S.C. §1983 without passing upon the due process claims or the class certification questions. This appeal followed.

Appellants do not presently press their challenges to §7-209, which authorizes imposition of the warehouseman's lien and retention of stored goods until it is satisfied.[10] They do, however, contend that enforcement of the warehouseman's lien by sale pursuant to §7-210 constitutes state action because the statute (1) delegates to the warehouseman uniquely governmental power and (2) expands the remedies available to the warehouseman beyond those which he possessed at common law. On the present record, this question is properly before us for decision. *See Tedeschi* v. *Blackwood,* 410 F. Supp. 34, 38-41 (D. Conn. 1976) (three-judge court) and cases there cited. *See also Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 752-757 (1976).

II.

The state action inquiry is not an easy one. *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 172 (1972). "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Au-*

which the organization serves a public function or acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Each of these factors is material; no one factor is conclusive.

496 F.2d at 629.

10 However, they state that they wish to preserve this point for possible review by the Supreme Court.

thority, 365 U.S. 715, 722 (1961). The ultimate question to be resolved is "whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974).

The first step in the resolution of this question is to identify correctly the particular kind of state action allegation with which the court is dealing. This is because standards for determining state action have been formulated in many different contexts, and the resulting formulations are not often interchangeable. For example, the criteria for finding state action in equal protection cases involving charges of racial discrimination are easier to meet than those formulated in cases such as that at bar. *See, e.g., Coleman* v. *Wagner College,* 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, *J.* concurring); *Jackson* v. *Statler Foundation, supra,* at 628-29; *Girard* v. *94th St. and Fifth Ave. Corp.,* 530 F.2d 66, 69 (2d Cir.), *cert. denied,* 425 U.S. 974 (1976). Similarly, tests for determining whether the state has become so entwined with a private entity—by financially supporting it, regulating it, or otherwise—as to make the actions of the private entity the state's own, are not of much help in resolving other types of state action problems.

In this case, Judge Werker used the factors enumerated in *Jackson* v. *Statler Foundation, supra,* at 629, *see supra* n.9, to determine whether state action was present. The *Jackson* factors, however, developed in a case where the appellant sought to characterize the allegedly racially discriminatory activities of certain private foundations as state action by virtue of the foundations' tax exempt status, are not particularly enlightening when applied to the factual situation at hand. The instant case involves a question of alleged delegation of distinctly governmental power,

which can best be resolved by reference to cases involving similar facts.

The Supreme Court has not yet squarely addressed the question of whether a delegation of state authority to creditors constitutes state action. Its only comment on the subject came in *Jackson* v. *Metropolitan Edison Co., supra,* where the Court rejected a claim that state action was present in a tariff-authorized termination of electric service by a privately owned and operated utility corporation holding a certificate of public convenience issued by the Pennsylvania Utility Commission. The Court there noted:

> If we were dealing with the exercise by [the power company] of some power delegated to it by the State which is traditionally associated with sovereignty . . . our case would be quite a different one.

419 U.S. at 352-53.

Several circuit courts, however, have decided the state action question in cases involving due process challenges to summary creditors' remedies similar to that presented here. These cases have focused on essentially the same factors (whether the state has delegated one of its unique powers to a private person; whether the common law rights of the creditor were expanded or merely codified; whether the creditor's power amounts to a roving commission or exists only over particular chattels that are closely connected with the debt; whether the creditor's remedy was authorized by contract as well as statute; whether the creditor's resort to the remedy was mandatory or optional; whether the state extensively regulates the creditor's industry; and even whether title rests in the debtor or creditor) to varying degrees and with varying results. *See Culbertson* v. *Leland,* 528 F.2d 426 (9th Cir. 1975) ("innkeeper's" lien; state action); *Hall* v. *Garson,* 430 F.2d

430 (5th Cir. 1970) ("innkeeper's" lien; state action); *Davis* v. *Richmond,* 512 F.2d 201 (1st Cir. 1975) ("innkeeper's" lien; no state action); *Anastasia* v. *Cosmopolitan National Bank of Chicago,* 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976) ("innkeeper's" lien; no state action); *Philips* v. *Money,* 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975) ("garageman's" lien; no state action); *James* v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974) (repossession; no state action); *Adams* v. *Southern California First National Bank,* 492 F.2d 324 (9th Cir.), *cert. denied,* 419 U.S. 1006 (1974) (repossession; no state action); *Fletcher* v. *Rhode Island Hospital Trust National Bank,* 496 F.2d 927 (1st Cir.), *cert. denied,* 419 U.S. 1001 (1974) (bank's right of set-off; no state action); *Melara* v. *Kennedy,* 541 F.2d 802 (9th Cir. 1976) (enforcement of warehouseman's lien under California Commercial Code §7210; no state action).

Appellants here specify only two factors which point to state action in the warehouseman's enforcement of his lien. We conclude, however, that the combination of New York's statutory delegation of distinctly governmental power to the warehouseman and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action.

New York Uniform Commercial Code §7-210 provides the warehouseman with a truly extraordinary remedy. After giving the bailor specified notice, *see supra* n. 1, the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally.

The Supreme Court has already shown its grave concern over even temporary deprivations of property without

prior judicial determination of the amount owing in a series of cases challenging various provisional remedies afforded creditors. *See Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes* v. *Shevin, supra; Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). These cases stand at least for the proposition that while judicial inquiry may at times be postponed, an adequate judicial determination of liability must take place before any deprivation of property if due process requirements are to be satisfied. The statutory scheme before us, in contrast, contemplates no judicial—or even impartial—determination of the amount owing before a final deprivation of property.

This would be quite beside the point if the state were not implicated in the warehouseman's enforcement of his lien. But by enacting §7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, *see Shirley* v. *State National Bank of Connecticut, supra*, at 747 (Kaufman, *C.J.*, dissenting); *Bond* v. *Dentzer*, 494 F.2d 302, 312 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974) (Kaufman, *C.J.*, dissenting), but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff.[11]

11 *Blye* v. *Globe-Wernicke Realty Co.*, 347 N.Y.S.2d 170 (1973). There, in finding that an innkeeper's enforcement of his lien pursuant to New York Lien Law §181 involves state action and violates due process, the New York Court of Appeals stated:

> In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52) traditionally has been the function of the Sheriff.

347 N.Y.S.2d at 175. *See* also *Sharrock* v. *Dell Buick-Cadillac, Inc.*, —— N.Y.S.2d —— (App. Div. 2d Dept., decided March 28, 1977).

We do not agree with Judge Werker's attempt to distinguish *Blye* on the ground that the liens referred to there all involve execution upon

This delegation expanded the warehouseman's remedies far beyond those existing at common law. There the warehouseman, in the absence of an express agreement authorizing sale upon default, could only retain the goods to coerce payment; he could not sell the goods and apply the proceeds to the debt. R. Brown, The Law of Personal Property §108, at 519, §119, at 588-89 (2d ed. 1955).[12] If mere detention of the goods failed to bring about payment, the warehouseman had to resort to the courts to obtain a judgment for the charges due and then deliver a writ of execution to the sheriff, who would sell the goods pursuant to the requirements of state law and deliver the proceeds to the warehouseman. *See* 62 N.Y. Jur. *Warehouse Receipts* §125, at 747, 747 n.2. Only in 1879[13] did the warehouseman for the first time become empowered to sell stored goods in satisfaction of delinquent charges.[14]

Appellees argue that the alteration of common law rights which took place is of little significance, citing the following passage from Burke and Reber, *State Action, Congres-*

goods having no particular relationship to the debt owing. A "conventional security interest" would include the typical purchase money security interest where the debt and security are fundamentally related.

Moreover, we are reluctant to rely heavily in the state action inquiry upon whether the property executed upon is closely connected to the alleged debt or not connected at all. This consideration bears only upon the extent of the intrusion upon the debtor's property rights that the state has authorized, and not upon whether the state has in fact delegated some of its sovereign power.

12 *See also Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y. Sup. Ct. 1832); *Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-45 (1900).

13 We note in passing that this was subsequent to the enactment of the fourteenth amendment.

14 *See* Ch. 336 [1879] N.Y. Laws 417. This statute underwent various amendments and reenactments, not here pertinent, before assuming its present form with the adoption of the Uniform Commercial Code in 1962. *See* Ch. 421, [1883] N.Y. Laws 592; Ch. 526, [1885] N.Y. Laws 891; Ch. 418, [1897] N.Y. Laws 514; Ch. 369, [1899] N.Y. Laws 793; Ch. 732, [1907] N.Y. Laws 1706; Ch. 588, [1949] N.Y. Laws 1339.

sional Power and Creditors' Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1 (1973):

> The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstances of the age and history of the law.

Id. at 47.

We of course agree that an alteration in the common law remedy alone is not dispositive of the state action inquiry. But we reject the authors' conclusion that statutes such as §7-210 have only a minor impact on "private ordering."

Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debt he claims he is owed judicially established, and then have the sheriff execute upon the goods which he concededly has the common law right to hold as security. The action of the state in granting the warehouseman the privileged position he enjoys under §7-210, even though long ago, drastically changes the balance of power between debtor and creditor. It permits a complete circumvention of the judicial process, by installing the warehouseman as the final and interested

judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment,[15] it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action.

The result we reach today accords with prior decisions of this circuit which conducted similar state action inquiries.

In *Shirley* v. *State National Bank of Connecticut, supra,* the plaintiff's automobile was peacefully repossessed by an assignee of the conditional seller, pursuant to a contractual provision. The plaintiff challenged the constitutionality of the Connecticut statute which authorizes such repossession if the sales contract expressly makes default a ground for retaking the property. In concluding that state action was not present, the court, with Chief Judge Kaufman dissenting, relied heavily on the fact that Connecticut creditors had a common law right to peaceful repossession without a hearing, and that the statutory enactment only increased protection of installment purchasers. Judge Mulligan reasoned that

> since peaceful repossession existed at common law in Connecticut, the mere codification of that right does not, in our view, constitute state action. No delegation of traditional state power has been granted to any private person.

493 F.2d at 743.

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15 This value is nonexistent, however, when a private party wields power that belongs to the state and is subject to egregious abuse if not regulated.

In *Bond* v. *Dentzer, supra,* the same panel which decided *Shirley* faced a similar question: whether the unilateral filing of wage assignments by creditors with their debtors' employers, as authorized by the New York wage assignment statute and pursuant to specific loan agreements, constitutes state action. Once again the court, with Chief Judge Kaufman dissenting, found no state action, rejecting the plaintiffs' "partnership," "encouragement," and "traditional state functions" theories. The partnership argument fell because of the lack of state "entwinement" with the defendant finance companies. The other arguments failed because the state had "not deprived the plaintiffs of anything," 494 F.2d at 307:

> [T]he legislation does not vest the assignee with any function traditionally performed by the State. The function of the wage assignment has always been that of a private levy without a prior court order. There was never any requirement or practice which has been called to our attention which mandated the creditor to first establish the debt before attaching the wages and which the State has now abrogated. In fact, as our prior discussion indicates, the State has created a right on the part of the debtor to question the debt by initiating an action which was not known at common law. In sum, the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law.

494 F.2d at 311.

The distinctions between the facts of *Shirley* and *Bond* and those of the case at bar are manifest. In neither of those cases was there any expansion of common law creditors' remedies or delegation of power traditionally

exercised by the state—the precise factors which we deem determinative in the present state action inquiry.[16] *See also Tedeschi* v. *Blackwood, supra,* at 42 n.10.

In the most recent case on the subject in this circuit, *Tedeschi* v. *Blackwood, supra,* Judge Smith, writing for a three-judge district court in Connecticut, concluded that statutory provisions permitting the foreclosure by sale of a garageman's lien for towing and storage—analogous to §7-210—involved state action and violated due process.

The statutory scheme at issue in *Tedeschi* empowered a police officer or motor vehicle inspector who determined that a motor vehicle had been abandoned, unregistered, or dangerously parked to have the vehicle towed to a garage for storage. All towing and storage charges incurred became a lien on the vehicle which in time could be foreclosed by the garage through its sale of the vehicle. The statute did not, however, afford a right to a hearing to a person wishing to contest the application of either its towing or its lien provisions to his vehicle.

Judge Smith found state action present in the implementation of the towing provisions by virtue of a state agent's "meaningful participation" by initiating all such towings. He then ruled that state action was present in the creation of the garageman's lien because, rather than merely "acknowledging" the legality of private conduct, this statute "authorized" conduct which would otherwise be impermissible.[17] Finally, he concluded that

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16 A further distinguishing feature of both *Shirley* and *Bond* is that the courts there concluded that the creditors' remedies in question were specifically authorized by contracts underlying the debts. Contrast n.3, *supra.*

17 Judge Smith observed:

> While Connecticut common law may recognize the legality of a garage lien for services on a vehicle voluntarily surrendered for the performance of these services, it does not recognize such a lien where the garage has gained possession of the vehicle without the

> taken *by itself*, the foreclosure of a garagekeeper's lien pursuant to §14-150 to cover towing and storage charges also constitutes "state action," [18]

410 F. Supp. at 42 (emphasis added), and noted that in *Hernandez* v. *European Auto Collision*, 487 F.2d 378 (2d Cir. 1973), this court gave a strong indication that it would find such foreclosure or sale provisions unconstitutional.

The plaintiff in *Hernandez*, whose car was auctioned off by a garageman after he refused to pay for allegedly unauthorized repairs, challenged the pertinent sale provision of the New York Lien Law. Without expressly addressing the issue of state action, the court, in an opinion by Judge Wyzanski, ruled that, if the facts were as plaintiff claimed, he had a tenable contention that the lien law as applied violated the due process clause. It directed the district court to try the case on its merits. Judge Timbers, in a concurring opinion joined by Judge Lumbard, would have taken the further step of directing the district court to declare the sale provisions unconstitutional as applied if Hernandez were able to prove his allegations. 487 F.2d at 383.

Appellants here argue that state action was found *sub silentio* by the *Hernandez* court, and point out that the plaintiff in that case briefed the point on appeal. While

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owner's consent. *See Paton* v. *Robinson*, 81 Conn. 547, 554, 71 A. 730 (1909).

410 F. Supp. at 42.

18 Judge Smith may have qualified this conclusion somewhat when he observed later in his opinion:

> Thus, even if, when considered by itself, the implementation of the lien provisions did not result in "state action", it would still be infected by the "state action" resulting from the implementation of §14-150's towing provision.

410 F. Supp. at 43.

such a *sub silentio* jurisdictional ruling is not binding precedent in this court, *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), we note Chief Judge Kaufman's dissent in *Shirley* v. *State National Bank of Connecticut, supra*, at 745-47, particularly his statement that the garageman's right of sale at issue in *Hernandez* did not exist at common law. *See also Sharrock* v. *Dell Buick-Cadillac, Inc., supra.*

We recognize that our holding that the enforcement of the warehouseman's lien pursuant to §7-210 constitutes action under color of state law is directly contrary to that of the Ninth Circuit in *Melara* v. *Kennedy, supra.* We have given that case due consideration, but we disagree with its conclusion and are unpersuaded by its analysis.

The case is reversed and remanded to the district court. On remand, the first question to be resolved is that of class determination,[19] because that may have an important bearing on the resolution of due process claims. Since the named plaintiffs in this case were consumers who stored personal belongings with Flagg Brothers and not merchants, the only constitutional challenge they can make individually is to §7-210(2), which authorizes enforcement of the warehouseman's lien upon goods "other than goods stored by a merchant in the course of his business." §7-210(1) is an entirely distinct provision which authorizes enforcement of the warehouseman's lien in the typical commercial warehousing situation, and defendant trade associations have raised a serious argument that a summary sale provision in this context may be constitutionally unobjectionable. *See D. H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). The constitutionality of §7-210(1) will not be before the court, however, unless commercial warehouses

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19 Leave is hereby granted for substitution of Jones' personal representative as plaintiff pursuant to Fed. R. Civ. P. 25(a). *See* n.7, *supra.*

are determined to be within a defendant class against which suit is brought by an appropriate class of plaintiffs.

Reversed and remanded.

HOLDEN, *District Judge*, dissenting:

I respectfully dissent. I am persuaded, as Judge Werker was, that his court was without jurisdiction and would affirm the dismissal of the action.

The unfortunate plight which confronted the plaintiff Brooks, following her eviction in June 1973, inspires concern. And Mrs. Jones was similarly situated when she was evicted in November of the same year. According to the complaints they were victimized by the overbearing of the defendant warehouseman. But on the facts alleged the State of New York was not a participant in the action taken by the defendant Flagg.

The defendant retained the bailed property under an ancient possessory lien conferred by the common law.[1] *See Schmidt* v. *Blood*, 9 Wend. 268, 271 (N.Y.Sup. Ct. 1832); *cf. Knapp, Stout & Co.* v. *McCaffrey*, 177 U.S. 638, 644-645 (1900). *See also* R. Whitaker, A Treatise of the Law Relative to the Rights of Lien and Stoppage in Transitu 13-14 (1816). While the complaints speak of threats of sale, that drastic remedy was not applied; the property has been returned to both plaintiffs.[2]

The power of sale asserted by the defendant was first conferred on warehousemen by an enactment of the New

1 The common law remedy in New York gave the warehouseman a possessory lien on the stored goods until the storage charges were paid.

2 After the action was brought, by agreement of counsel, the plaintiff Brooks removed her goods without paying the storage charges. The plaintiff Jones' storage charges were paid with protest against the amount of the charges and the goods were removed.

York Legislature in 1879. Ch. 336 [1879] N.Y. Laws 417. Thus, for nearly a century warehousemen in New York have had the authority to sell goods stored with them to satisfy delinquent charges. The majority of the court concludes that the "statutory delegation of government power and its corresponding expansion of his common law remedies suffices to thrust the state's involvement in the challenged activity over the threshold of state action." According to the majority, that thrust is sufficient to generate the judicial power to uproot a statutory provision that has governed the rights and remedies between warehousemen and their bailors for many years without interdiction by the courts of New York.

I agree that the question to be searched is whether the State of New York has become so involved in the retention and threatened sale of the plaintiff's goods that defendant's action "may be fairly treated as that of the State itself." *Jackson* v. *Metropolitan Edison Co., supra* at 351. Without such participation the Fourteenth Amendment affords no protection. *Id.*

Of course a state can act only by way of its legislative, executive and judicial branches. *Ex parte Virginia*, 100 U.S. 339, 347 (1880). Here there is no suggestion of state participation by judicial action. To the contrary, it is the want of judicial action that is the predicate of the complaint. And the State's executive officers were not participants in either the creation of the lien or the threat to enforce it. The State quit the arena when the evictions were accomplished, before the present controversy began. The only state involvement is through the action of the legislature in adopting the challenged provisions of the Uniform Commercial Code § 7-210.

The question, as I perceive it, is whether the remedies provided by §§ 7-209 and 7-210 of the New York Uniform Commercial Code are "commanded" by the State, or "so

entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U.S. 296, 299 (1966).

The roots of the present controversy are embedded in private dealings between the warehouseman and the bailors of the property that was stored in the warehouse facility. No state agency or official has intervened to sell or threaten to sell the property entrusted by the plaintiffs to the defendant warehouseman. As to non-commercial storage, such as here involved, the Uniform Commercial Code merely retained the detailed provisions for notice, publication and public sale found in Section 33 of the Uniform Warehouse Receipts Act. Uniform Commercial Code § 7-210, Official Comment 1.

In *Shirley* v. *State National Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974), the court was concerned with state action in the context of the Connecticut Retail Installment Sales Financing Act. Writing for the majority, Judge Mulligan pointed out:

> Here the right to private repossession always existed. Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards to the consumer in the conditional sales contract.

Id. at 744.

By the law of New York the enforcement of a warehousman's lien, for nearly a hundred years, has not been the function of the sheriff. As will be seen from what is written in the margin, the historical background of the challenged statute tells us that the State of New York has not been significantly involved in the enforcement of the warehouseman's lien since 1879 unless, of course, either

the bailor or bailee elected to resort to judicial action. And the statute makes no "command" that §§ 7-209 and 7-210 shall be pursued as the warehouseman's exclusive remedy. *Compare Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963). The statutory history of the contested provisions of the New York Uniform Commercial Code indicates that there has been an accretion of safeguards to the mutual benefit of the parties to the bailment. *Cf. Bond* v. *Dentzer*, 494 F.2d 302, 307-09 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974); *Shirley* v. *State National Bank, supra*, 493 F.2d at 742.

Resolution of the question of government action "hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." *Wahba* v. *New York University*, 492 F.2d 96, 102 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969).

Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute state action. *Bond* v. *Dentzer, supra. See Shirley* v. *State National Bank, supra*, 493 F.2d at 744.

Unlike the majority, I am persuaded that the adoption of § 7-210 of the New York Commercial Code does not constitute state action. The reasoning pursued in *Melara* v. *Kennedy*, 541 F.2d 802 (9th Cir. 1976) on the very question presented here, appears to me to be sound. *See also Smith* v. *Bekins Moving & Storage Co.*, 384 F.Supp. 1261 (E.D. Pa. 1974).

As we have seen, New York Uniform Commercial Code §§ 7-209 and 7-210 afford a choice of remedies to both bailor and bailee. The defendant warehouseman's exercise, or threatened exercise, of the power of sale allowed by the Code, "where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." *Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 357.

Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

SEPARATE OPINION OF HOLDEN, D.J., IN DISSENT, 553 F.2d at 775

[TITLE OMITTED IN PRINTING]

HOLDEN, *District Judge,* dissenting:

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Absent the jurisdictional requisite of state action, I would affirm the order of the District Court without reaching the due process claim.

COURT OF APPEALS JUDGMENT ENTERED ON OPINION IN NO. 75-7437

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. JAMES S. HOLDEN

HON. FREDERICK vanPELT BRYAN
District Judges

Shirley Herriot Brooks, Gloria Jones, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

Flagg Brothers, Inc., individually and as representatives of a class of all others similarly situated, Henry Flagg, individually and as President of Flagg Brothers, Inc., The American Warehousemen's Association of the International Association of Refrigerated Warehouses, Inc., The Warehousemen's Association of New York and New Jersey, Inc., and The Cold Storage Warehousemen's Association of the Port of New York,

Defendants-Appellees.

Judgment of the Court of Appeals

75-7437

Filed
Apr. 7, 1977
A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk